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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]116

ALEXANDER SMITH COCHRAN AND WILLIAM F. COCHRAN, AS SURVIVING EXECUTORS OF THE LAST WILL AND TESTAMENT OF WILLIAM F. COCHRAN, DECEASED, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 31, 1919.

(37,144)

(27,144)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 390.

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vs.

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INDEX.

Byron S. Adams & Detweiler (Inc.), Printers, Washington, D. C., October 9, 1919.

1 1. *Petition and Exhibits "A" and B."*

Filed June 23, 1916.

In the Court of Claims of the United States.

No. 33302.

ALEXANDER SMITH COCHRAN and WILLIAM F. COCHRAN, as Surviving Executors of the Last Will and Testament of William F. Cochran, Deceased, Petitioners,

vs.

THE UNITED STATES.

Petition.

To the Honorable the Chief Justice and the Judges of the Court of Claims:

Your Petitioners, Alexander Smith Cochran and William F. Cochran, Jr., as surviving executors of the last will and testament of William F. Cochran, deceased, respectfully represent:

2 1.

That on June 13, 1898, the President of the United States approved an act entitled "An act to provide ways and means to meet war expenditures and for other purposes" (30 Stat., 448), by Section 29 of which legacies and distributive shares arising from personal property became subject to a tax. The portions of said Section 29 material to this case are as follows:

"That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and

shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:

"First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

"Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

* * * * * * *

"Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, * * * at the rate of five dollars for each and every hundred dollars of the clear value of such interest:

* * * * * * *

"Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; * * *."

II.

That Section 31 (30 Stat., 448, 466) of said act of June 13, 1898, entitled as aforesaid, was, in full, as follows:

"Section 31. That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed are hereby made applicable to this Act."

III.

That Section 3182 of the Revised Statutes of the United States, so far as material to this case, is as follows:

"The Commissioner of Internal Revenue is hereby authorized and required to make inquiries, determinations, and assessments
4 of all taxes and penalties imposed by this Title, or accruing under any former internal-revenue act where such taxes have not been duly paid by stamp at the time and in the manner provided by law, and shall certify a list of such assessments when made to the proper collectors respectively, who shall proceed to collect and account for the taxes and penalties certified. * * * And all provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply, so far as may be necessary, to the proceedings herein authorized and directed."

IV.

That on April 12, 1902, the President of the United States approved an act entitled "An Act to repeal war-revenue taxation, and for other purposes" (32 Stat., 96), by which said Section 29 of the said Act of June 13, 1898, was repealed, said repeal to take effect on July 1, 1902. The portions of said Act of April 12, 1902, material to this case, are as follows:

"Section 7. That section four of said Act of March second, nineteen hundred and one, and sections six, twelve, eighteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, schedule A, schedule B, sections twenty-seven, twenty-eight, and twenty-nine of the Act of June thirteenth, eighteen hundred and ninety-eight, and all amendments of said sections and schedules be, and the same are hereby, repealed.

"Section 8. That all taxes or duties imposed by section twenty-nine of the Act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, prior to the taking effect of this Act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty of said Act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force, as follows:

* * * * * * *

5 "Section 11. That this Act, except as otherwise specially provided for in the preceding section, shall take effect July first, nineteen hundred and two."

V.

That on June 27, 1902, the President of the United States approved an act entitled "An act to provide for refunding taxes paid upon legacies and bequests for uses of a religious, charitable, or educational character, for the encouragement of art, and so forth, under the Act of June thirteenth, eighteen hundred and ninety-eight, and for other purposes" (32 Stat., 406), of which Section 3 is material in this case and reads as follows:

"That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

VI.

That on July 27, 1912, the President of the United States approved an act entitled "An act extending the time for the
6 repayment of certain war-revenue taxes erroneously collected" (37 Stat., 240), which is material in this case and reads as follows:

"That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the Act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said Act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

"Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the Act aforesaid."

VII.

That on or about September 27, 1901, William F. Cochran, a citizen of the United States and of the State of New York, and a resident of the County of Westchester in said State, departed this life, leaving a valid last will and testament and codicil, which said last will and testament and codicil was thereafter, to wit, on or about

January 8, 1902, duly admitted to probate and record by the Surrogate's Court in and for the County of Westchester in said State, a court of competent jurisdiction, and letters testamentary were by order of said court, duly issued to Alexander Smith Cochran and William F. Cochran, Jr., petitioners herein, and to Eva S. Cochran, who were therein named as executors and executrix, they having accepted said trust; that said Eva S. Cochran has since de-
7 ceased; that your petitioners and the said Eva S. Cochran duly qualified and acted until the death of the said Eva S. Cochran as executors and executrix, as aforesaid; and that since the death of the said Eva S. Cochran, your petitioners have acted and they are now acting as executors, as aforesaid. A certified copy of the said last will and testament and codicil is herewith filed, marked "Petitioners' Exhibit A" and a certificate of the issue of said letters testamentary is herewith filed and marked "Petitioners' Exhibit B." Both of these petitioners' exhibits are prayed to be read and considered as parts of this petition.

VIII.

Portions of the said last will and testament and codicil material in this case are as follows:

"Fifth: (Will) I direct my Executors to set apart out of the bonds, bearing interest at five per centum per annum, which shall belong to me at the time of my decease, thirty bonds of one thousand dollars each, par value, and to hold the same in trust, to collect the interest thereon, and to pay the same in equal half yearly payments, from the time of my decease, to my niece, Louise C. De Wolf, during her life, and upon her decease to pay over the capital of said trust fund to my next of kin according to the laws of the State of New York.

"Sixth: (Will) I give and bequeath to my aunt, Mrs. E. M. Cochran, widow of James G. Cochran, deceased, now living at Houtenville, New Jersey, and in the event that she should not survive me, then to her daughter, Jennie, twenty-five thousand dollars, to bear interest from the time of my decease, at the rate of four per centum per annum, payable quarterly.

* * * * * * *

"Eleventh: (Will) I have already given to my daughter, Anna C. Ewing, the sum of twenty thousand dollars for the purchase of a residence, I therefore give and bequeath twenty thousand
8 dollars to each of my other children, namely: Elinor, the wife of Percy H. Stewart, Alexander Smith Cochran, William F. Cochran, Junior, Elizabeth Baldwin Cochran and Gifford Alexander Cochran.

* * * * * * *

"Thirteenth: (Will) I give and bequeath to my executors hereinafter named their survivor or successors, the sum of fifty thousand dollars for each of my daughters, Anna C. Ewing, Elinor the wife of Percy H. Stewart, and Elizabeth Baldwin Cochran, (one hundred and fifty thousand dollars in all) in trust, to keep the sum of fifty thousand dollars separately invested for each daughter, as hereinafter directed, and to pay over the net annual income thereof to the daughter for whom the same shall be invested or apply the same to her use during her life * * * and upon the death of each daughter to divide the capital of said fund set apart for her, into so many equal shares as there shall be lawful children of hers her surviving, or who shall have died in her lifetime, leaving lawful descendants her surviving, to pay over one of such shares to the lawful descendants of each child of such daughter, who shall have died in her lifetime leaving lawful descendants her surviving, per stirpes and not per capita, to pay over one of such shares to each child of such daughter who shall survive her and who shall be twenty-one years of age at the death of such daughter, to retain in their hands one of such shares for each child of said daughter who shall survive her and who shall be under twenty-one years of age at the time of the death of such daughter, to keep the same invested as hereinafter directed to apply so much of the net income of such share as in their judgment shall be needful, to the support, maintenance and education of such child and to accumulate the balance of such income until such child shall reach twenty-one years of age or die before that time, to pay over the capital of such share and all accumulations thereon to such child, upon such child's reaching twenty-one years of age, and in the event of such child's dying before reaching twenty-one years of age, to pay over the capital of such share
9 and all accumulations of income thereon to the lawful descendants of such child per stirpes and not per capita, and in the default of such descendants to my next of kin according to the laws of the State of New York.

"Fourteenth: (Will) I give and bequeath to my executors, hereinafter named, their survivor or successors, the sum of one hundred thousand dollars for each of my sons, Alexander Smith Cochran, William F. Cochran, Junior, and Gifford Alexander Cochran, (three hundred thousand dollars in all) in trust, to keep the sum of one hundred thousand dollars separately invested for each son, as hereinafter directed, and to pay over the net annual income thereof, to the son for whom the share shall be invested, or apply the same to his use during his life, * * * and upon the death of each son, to divide the capital of said fund set apart for him into so many equal shares, as there shall be lawful children of his him surviving, or who shall have died in his lifetime, leaving lawful descendants him surviving, to pay over one of such shares to the lawful descendants of each child of such son, who shall have died in his lifetime, leaving lawful descendants him surviving per stirpes and not per capita, to pay over one of such shares to each child of such son who shall survive him, and who shall be twenty-one years of age at the time of the

death of such son, to retain in their hands one of such shares for each child of said son who shall survive him and who shall be under twenty-one years of age at the time of the death of such son, to keep the same invested, as hereinafter directed, to apply so much of the net income of such share as in their judgment, shall be needful to the support, maintenance and education of such child and to accumulate a balance of such income until such child shall reach twenty-one years of age, or die before that time, to pay over the capital of such share, and all accumulations thereon, to such child upon such child's reaching twenty-one years of age, and in the event of the child's dying before reaching twenty-one years of age, to pay over the capital of
10 such share, and all accumulations of income thereon, to the lawful descendants of such child, per stirpes and not per capita, and in default of such descendants, to my next of kin according to the laws of the State of New York.

"The provisions of the preceding twelfth, thirteenth and of this fourteenth clause of my will have been made in view of the fact that I have by deeds already placed in trust fifty thousand dollars for each of my daughters, Anna, the wife of Thomas Ewing, Junior, and Elinor, the wife of Percy H. Stewart, and with the purpose that by virtue of said deeds and of this my will, the sum of one hundred thousand dollars shall be held in trust for each of my children.

* * * * * * *

"Fifteenth: (Will) All the rest, residue and remainder of my estate, real and personal, and wheresoever situated, of which I shall die seized or possessed, or to which I shall be entitled at the time of my decease, I give, devise and bequeath to my wife, Eva S. Cochran, (and if she shall not survive me to my daughter Anna C. Ewing in her mother's place) and to my son Alexander Smith Cochran and my son William F. Cochran, Junior, and their survivors and successors, in trust, nevertheless, for the uses and purposes hereinafter mentioned:

"I. To divide the said residuary estate into so many equal shares as there shall be children of mine me surviving and who shall have died in my lifetime leaving lawful descendants me surviving.

"I direct my said trustees to apportion among the said shares, equally as near as may be, the capital stock and the scrip certificates of the Alexander Smith and Sons Carpet Company, which shall be owned by me at the time of my decease.

"One of such shares of my residuary estate shall be set apart for each child of mine who shall survive me and one for the lawful descendants of each other child of mine who shall have died in my lifetime leaving lawful descendants me surviving.

"II. To pay over, transfer and deliver to each child of mine who shall survive me, except my daughter Elinor, the wife of Percy
11 H. Stewart, and except my son Gifford Alexander Cochran, in case he shall be under twenty-one years of age at the time

of my decease, the share of my residuary estate set apart for such child, as hereinbefore provided, and I give, devise and bequeath each said share to each such child absolutely, in his or her own right, free, in case of any daughter, from any right, title, or interest therein, or control thereover, of any husband she may have.

"III. To retain in their hands, the share of my residuary estate apart for my daughter Elinor, the wife of Percy H. Stewart, to invest and to keep the same invested, as hereinafter provided, and collect the interest, rents, issues and income thereof, and during the life of the said Elinor, to pay over the net income and produce thereof, in half yearly or quarterly payments, to the said Elinor, or upon her written order, or to apply the same to her use, in such manner as a Court of competent jurisdiction shall direct, in case she shall at any time be incompetent or unable to receipt for or direct the payment of same.

"And upon the death of the said Elinor, after my decease, leaving lawful descendants her surviving, to divide the capital of the said share, of the said Elinor, into so many equal parts as there shall be lawful children of hers her surviving, or who shall have died in her lifetime, leaving lawful descendants her surviving, to pay over one of such parts to the lawful descendants of each child of the said Elinor who shall have died in her lifetime, leaving lawful descendants her surviving, per stirpes and not per capita; to pay over one of such parts to each child of the said Elinor, who shall survive her and who shall be twenty-one years of age at the time of the death of the said Elinor; to retain in their hands one of such parts for each child of the said Elinor who shall survive her and who shall be under twenty-one years of age at the time of the death of the said Elinor, to keep the same invested, as hereinafter directed, to apply so much of the net income of such part, as in their judgment shall be needful to the support, maintenance and education of such child, and to accumulate the balance of such income until such child shall reach twenty-
12 one years of age, or die before that time; to pay over the capital of such part and all accumulations of income thereon, to such child, upon such child's reaching twenty-one years of age, and in the event of such child's dying before reaching twenty-one years of age, to pay over the capital of such part, and all accumulations of income thereon, to the lawful descendants of such child, per stirpes and not per capita, and in default of such descendants, to my next of kin according to the laws of the State of New York; and in the event of the death of the said Elinor, after my decease, leaving no lawful descendants, her surviving, to dispose of the capital of the share of the said Elinor as part of my residuary estate.

"And in case my said daughter, Elinor, shall die in my lifetime leaving lawful descendants me surviving, I direct my said Trustees, their survivor or successors to divide the share of my residuary estate which would be set apart to such descendants into so many equal parts as there shall be lawful children of the said Elinor me surviving, or who shall have died in my lifetime leaving lawful descendants me

surviving, to pay over one of such parts to the lawful descendants of each child of the said Elinor who shall have died in my lifetime, leaving lawful descendants me surviving, per stirpes and not per capita; to pay over one of such parts to each child of the said Elinor who shall survive me and who shall be twenty-one years of age at the time of my decease, to retain in their hands one of such parts for each child of the said Elinor who shall survive me and who shall be under twenty-one years of age at the time of my decease, to keep the same invested, as hereinafter directed, to apply so much of the net income of such part, as in their judgment shall be needful to the support, maintenance and education of such child, and to accumulate the balance of such income, until such child shall reach twenty-one years of age, or die before that time, to pay over the capital of such part, and all accumulations of income thereon, to such child upon such child's reaching twenty-one years of age, and in the event of such child's dying before reaching twenty-one years of age, to
13 pay over the capital of such part, and all accumulations of income thereon, to the lawful descendants of such child per stirpes and not per capita, and in default of such descendants to my next of kin according to the laws of the State of New York.

"IV. To retain in their hands, in case my son Gifford Alexander Cochran shall be under twenty-one years of age at the time of my decease, the share of my residuary estate set apart for him, to invest and to keep the same invested, as hereinafter provided, and to collect the interest, rents, issues and income thereof, and out of the net income thereof, to apply and expend for the maintenance, support and education of my said son Gifford, the sum of three thousand dollars, or so much of said sum as shall be necessary, annually, during his minority, and to accumulate, during his minority, invest and keep invested the residue of such net income, and to pay over the principal of such share with all such accumulations, to my said son Gifford upon his reaching twenty-one years of age, and in the event of the death of my said son, Gifford, before reaching twenty-one years of age, leaving lawful descendants him surviving, to pay over such principal, and accumulations, to such descendants, in equal shares, per stirpes and not per capita, and in default of such descendants to my next of kin according to the laws of the State of New York.

"V. To pay over, transfer and deliver the share set apart for the lawful descendants of any child of mine, except the said Elinor, who shall have died in my lifetime leaving lawful descendants me surviving to such descendant in equal shares, per stirpes and not per capita, to whom I give, devise and bequeath the same absolutely.

"Sixteenth. My trustees may, in respect to the trusts created by this my will, retain, at their discretion, any securities or property belonging to my estate as an investment of the whole or any part of the trust funds, and may make, and from time to time, if the occasion requires, renew the investment of such funds, or any part thereof, in such sound securities as prudent persons are in the habit

of selecting for investment of their own funds, particularly
14 in bonds secured by first mortgages on improved real estate in the City of New York, and in, the mortgage bonds of sound dividends paying railroad companies but said trustees shall be under no obligation to invest the said trust funds in the particular kinds of security which the Courts of this State require in the absence of the permission given or intended to be given herein.

"First. (Codicil) * * * I give and bequeath to my executors, in said will named, their survivors and successors, the sum of fifty thousand dollars, in trust, to keep the same invested as directed in my said will as to the investment of funds left by me in trust, and during the life of my daughter, Elizabeth Baldwin Cochran, to pay over the net income thereof in half yearly or quarterly payments to the said Elizabeth, or apply the same to her use.

And upon the death of the said Elizabeth, leaving lawful descendants her surviving, to divide the capital of said trust fund into so many equal shares as there shall be lawful children of the said Elizabeth her surviving, or who shall have died in her lifetime leaving lawful descendants her surviving, and to pay over one of such shares to such lawful child of the said Elizabeth her surviving, and one of such shares to the lawful descendants of each child of the said Elizabeth who shall have died in her lifetime, leaving lawful descendants surviving the said Elizabeth, per stirpes and not per capita."

IX.

Sections 1819, 2718 (so far as material in this case), 2721, 2722, and 2723 of the Code of Civil Procedure of the State of New York, in force at the time of the decease of the said William F. Cochran and continuously thereafter until July 1, 1902, and for some years thereafter, are as follows:

"Section 1819. If, after the expiration of one year from the granting of letters testamentary or letters of administration, an executor or administrator refuses, upon demand, to pay a legacy,
or distributive share, the person entitled thereto may main-
15 tain such an action against him, as the case requires. But for the purpose of computing the time, within which such an action must be commenced, the cause of action is deemed to accrue, when the executor's or administrator's account is judicially settled, and not before."

"Section 2718. The executor or administrator at any time after the granting of his letters, may insert a notice, once in each week for six months in such newspaper or newspapers printed in the county as the surrogate directs, requiring all persons having claims against the deceased to exhibit the same, with the vouchers therefor, to him, at a place to be specified in the notice, at or before a day therein named, which must be at least six months from the day of the first publication of the notice * * * If a suit be brought on a claim which is not presented to the executor or administrator within six months from the first publication of such notice, the

executor or administrator shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the next of kin before such suit was commenced."

"Section 2721. No legacy shall be paid by any executor or administrator until after the expiration of one year from the time of granting letters testamentary or of administration, unless directed by the will to be sooner paid. If directed to be sooner paid, the executor or administrator may require a bond, with two sufficient sureties, conditioned, that if debts against the deceased duly appear, and there are not assets to pay the same, and no other assets sufficient to pay other legacies, then the legatees will refund the legacy so paid, or such ratable portion thereof with the other legatees, as may be necessary for the payment of such debts, and the proportional parts of such other legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee, and that if the probate of the will, under which such legacy is paid, be revoked, or the will declared void, that such legatee will refund the whole of such legacy, with the interest, to the executor
16 or administrator entitled thereto. After the expiration of one year, the executors or administrators must discharge the specific legacies bequeathed by the will and pay the general legacies, if there be assets. If there are not sufficient assets, then an abatement of the general legacies must be made in equal proportions. Such payment shall be enforced by the surrogate in the same manner as the return of an inventory, and by a suit on the bond of such executor or administrator whenever directed by the surrogate."

Section 2722. In either of the following cases a petition may be presented to the surrogate's court, praying for a decree, directing an executor or administrator to pay the petitioner's claim, and that he be cited to show cause why such a decree should not be made:

"1. By a creditor, for the payment of a debt, or of its just proportional part, at any time after six months have expired since letters were granted.

"2. By a person entitled to a legacy, or any other pecuniary provision under the will, or a distributive share, for the payment or satisfaction thereof, or of its just proportional part, at any time after one year has expired since letters were granted.

"On the presentation of such a petition, the surrogate must issue a citation accordingly; and on the return thereof, he must make such a decree in the premises as justice requires. But in either of the following cases the decree must dismiss the petition without prejudice to an action or an accounting, in behalf of the petitioner:

"1. When an executor or administrator files a written answer, duly verified, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity and legality, absolutely, or on information and belief.

"2. Where it is not proved, to the satisfaction of the surrogate, that there is money or other personal property of the estate, applic-

able to the payment or satisfaction of the petitioner's claim and which may be so applied, without injuriously affecting the rights of others, entitled to priority or equality of payment or satisfaction."

17 "Section 2723. In a case specified in subdivision second of the last section, the surrogate may in his discretion, entertain the petition at any time after letters are granted, although a year has not expired. In such a case, if it appears, on the return of the citation, that a decree for payment may be made, as prescribed in the last section; and that the amount of money and the value of the other property in the hands of the executor or administrator applicable to the payment of debts, legacies and expenses, exceed, by at least one-third, the amount of all known debts and claims against the estate, of all legacies which are entitled to priority over the petitioner's claim and of all legacies and distributive shares of the same class; and that the payment or satisfaction of the legacy, pecuniary provision or distributive share, or some part thereof, is necessary for the support or education of the petitioner; the surrogate may, in his discretion, make a decree directing payment or satisfaction accordingly, on the filing of a bond, approved by the surrogate, conditioned as prescribed by law, with respect to a bond which an executor or an administrator with the will annexed may require from a legatee, on payment or satisfaction of a legacy, before the expiration of one year from the time when letters were issued, pursuant to a direction to that effect contained in the will."

X.

That the estate of the said decedent was and has been administered by the said executors and executrix subject to and in all respects in accordance with the laws of the State of New York, as aforesaid. That pursuant to law and to an order of the said Surrogate's Court, due publication was made of a notice to present claims against the estate of the said decedent; that the first publication of said notice was made on January 30, 1902, and said notice was published once a week for six months thereafter; that the time within which to present claims in accordance with the law and the aforesaid order
18 and notice did not expire until after July 1, 1902, that is to say, until August 1, 1902. That the amount of claims against the estate of said decedent which were ascertained and paid prior to July 1, 1902, was $66,776.25 or thereabouts, and the expenses of administration paid prior to said July 1, 1902, aggregated $13,047.16, or thereabouts; that there has been and is still pending a disputed claim against the said estate made by Lorenz Reich of the City of New York, which said disputed claim has been and still is in litigation and regards transactions amounting in the aggregate to several hundreds of thousands of dollars; that the last accounting of the administration of said estate covered the period to and including March 31, 1912; that the total amount of all claims ascertained and paid to said March 31, 1912, was $112,504.47; that the total of the administration expenses paid to said March 31, 1912, exclusive of executors'

commissions was $230,114.35; that the total claims against said estate ascertained and paid prior to April 15, 1915, was $183,099.27; that the total expenses of administration, paid up to said April 15, 1915, exclusive of executors' commissions, was $251,204.79. That prior to and upon July 1, 1902, the amount of the claims against the estate of said decedent was unknown and said amount could not have been ascertained or known prior to the expiration of the time for presenting said claims fixed in said order and notice to creditors, that is to say, until August 1, 1902, if then, and that it was not possible to ascertain on or before said July 1, 1902, the net or actual or clear value, if any, of the said estate, or of the residuary estate of the said decedent, or the actual or clear value of the legacies, or any of them, arising out of the personal property of the said decedent and provided in the said last will and testament and codicil.

XI.

19 That the said William F. Cochran, dec[illegible]d, left him surviving among the persons mentioned as legatees in his said last will and testament and codicil, Louise C. De Wolf, a daughter of a sister of the said decedent; Mrs. E. M. Cochran, a stranger to the blood of the said decedent; Alexander S. Cochran and William F. Cochran, Jr., sons of the said decedent and petitioners herein; Gifford A. Cochran, a son of the said decedent; and Anna C. Ewing, Elinor C. Stewart and Elizabeth B. Cochran, daughters of the said decedent; that prior to July 1, 1902, that is to say, on June 15, 1902, the said executors and executrix delivered to trustees for the benefit of the said Louise C. De Wolf, the five per cent bonds having an aggregate par value of $30,000.00, as required by the fifth paragraph of the said last will and testament; that prior to July 1, 1902, that is to say, on May 16, 1902, the said executors and executrix paid and delivered to the trustees provided for in said will, the sum of $500,000.00, being the amount required to be placed in trust to satisfy the provisions of the thirteenth and fourteenth paragraphs of the said last will and testament and the provision of the said codicil to the said last will and testament; that prior to July 1, 1902, that is to say, on May 9, 1902, there was advanced or paid to Mrs. E. M. Cochran, widow of James G. Cochran, deceased, the sum of $23,011.10; that prior to said July 1, 1902, the said executors and executrix advanced or paid to each of the six residuary legatees named in the fifteenth paragraph of the said last will and testament, except the said Elinor C. Stewart, the sum of $431,328.00 and paid to trustees for the benefit of the said Elinor C. Stewart, in accordance with Sub-division III of the said fifteenth paragraph of the said last will and testament, the sum of $431,328.00; that except as hereinbefore stated, no payments on account of any interest arising out of the personal property of the said decedent were made to or for the benefit of any of the said legatees, herein named, prior to said July 1, 1902; that the sums paid over as aforesaid were not in satisfaction of legacies arising out

of the personal property of the said decedent and passing to the
20 said legatees, but were advances out of the funds of the said estate made and provided by the said executors and executrix, at and upon their own personal risk and responsibility, for and on account of which the said executors became and remained, on July 1, 1902, and thereafter, liable in their private and personal estates to any creditors of the estate of the said decedent or other claimants against said estate, for the satisfaction of whose claims the funds remaining in the hands of the said executors and executrix might thereafter prove insufficient. That the trustees and legatees, to the extent of the sums paid as aforesaid, prior to July 1, 1902, were, on said July 1, 1902, and thereafter, liable and responsible for the return of the whole or ratable portions thereof in case and to the extent that the sums remaining in the said estate were insufficient to satisfy all valid claims. That the amount of said claims had not been ascertained and could not have been ascertained prior to July 1, 1902, and that said executors and executrix and trustees and legatees were liable, as aforesaid, at least until August 1, 1902, and that the sums paid as aforesaid to said legatees and trustees, whether on or before July 1, 1902, did not absolutely vest in possession or enjoyment, prior to July 1, 1902, within the meaning of the Act of Congress of June 27, 1902.

XII.

That neither on nor before July 1, 1902, did the Commissioner of Internal Revenue, or any other officer or officers of the United States, or any officer or person or persons acting or claiming to act under the authority of the United States, or of any act of Congress, assess any tax or attempt to assess any tax or claim to have assessed any tax against the estate of the said William F. Cochran, deceased, or against any legacy or distributive share arising out of the personal property passing from said decedent or on account of any legacy or
21 distributive share in said estate passing to or for the use of any of the legatees named in the said last will and testament and codicil, under, or in accordance with Section 29 of the Act of Congress of June 13, 1898, and amendments; that during or about the month of February, 1903, the Commissioner of Internal Revenue made a pretended assessment or claimed to assess a tax in accordance with Section 29 of the Act of Congress of June 13, 1898, and amendments, upon or in respect of certain legacies arising out of the personal property of the said William F. Cochran, deceased; that the (1) persons to whom the interests against or in respect of which said assessment was claimed to have been made, and (2) the amount of the tax claimed to have been assessed against each of such interests and in the aggregate were as follows, that is to say:

Legatee.	Amount claimed to have been assessed.
Louise C. De Wolf	$216.46
Mrs. E. M. Cochran	1,187.50
Alexander S. Cochran	28,383.10
William F. Cochran, Jr.	28,409.05
Gifford A. Cochran	28,456.00
Anna C. Ewing	27,129.53
Elinor C. Stewart	16,118.82
Elizabeth B. Cochran	28,421.32
Total	$158,321.78

That the actual and clear value of the interests of the legatees as aforesaid, was on July 1, 1902, and at all times prior thereto and has continued and still is uncertain and indefinite and could not be determined except by appraisement.

22

XIII.

That on or about March 14, 1903, the United States Collector of Internal Revenue for the Fourteenth District of New York, represented and claimed to the executors and executrix, as aforesaid that there had been lawfully assessed against legacies in their charge arising out of the personal property of the estate of the said William F. Cochran, deceased, the sum of $158,321.78, as aforesaid, which sum the said Collector of Internal Revenue thereupon demanded and collected from said executors and executrix, and the said executors and executrix paid to the said Collector; that the Petitioners are informed and believe, and therefore aver, that the said Collector, in the ordinary course of his business as Collector duly paid the said $158,321.78 to the United States.

XIV.

That during the month of June, 1904, a claim for the refundment of the said sum of $158,321.78 was presented to the Commissioner of Internal Revenue, in accordance with the law in that case made and provided; that on or about May 21, 1915, the said claim was allowed in the sum of $107,292.24, which sum was thereafter repaid to the said executors and executrix, and that the said claim was rejected and disallowed as to the balance thereof; that there is now retained and held in the Treasury of the United States, the sum of $51,029.54, which is a part of the said sum of $158,321.78, and that the said Commissioner of Internal Revenue and the Secretary of the Treasury have refused and continue to refuse and do now refuse to refund or pay the said $51,029.54 to the petitioners and to the said estate; that your petitioners are advised and believe and therefore aver that

the Commissioner of Internal Revenue and the said Secretary
23 of the Treasury claim and assert that the said $51,029.54 was lawfully collected and is lawfully retained as being the aggregate of taxes upon interests in the estate of the said William F. Cochran, deceased, as follows:

Interest of—	Amount.
Louise C. De Wolf	$216.46
Mrs. E. M. Cochran	1,150.56
Alexander S. Cochran	9,400.82
William F. Cochran, Jr.	9,422.61
Gifford A. Cochran	9,462.10
Anna C. Ewing	6,976.07
Elinor C. Stewart	4,967.95
Elizabeth B. Cochran	9,432.97
Total	$51,029.54

Petitioners are advised by counsel and therefore aver:

First. That no legacy passed, within the meaning of Section 29 of the Act of Congress of June 13, 1898, and amendments, from the said William F. Cochran, deceased, to any of the said legatees, on or before July 1, 1902.

Second. That on July 1, 1902, and at all times prior thereto, after the death of the said William F. Cochran, deceased, the interests of the legatees in respect of which the said pretended assessment and each and every portion thereof was made, in the said estate, were, within the meaning of Section 3 of the Act of Congress of June 27, 1902, contingent beneficial interests which had not absolutely vested in possession or enjoyment.

Third. That the Act of Congress of April 12, 1902, which repealed Section 29 of the Act of June 13, 1898, and amendments,
24 saved to the United States the right to collect such taxes only as had been or should be imposed prior to July 1, 1902; that no tax was imposed until it had been lawfully assessed by the Commissioner of Internal Revenue and that subsequent to July 1, 1902, no lawful assessment could be made and there was no authority to collect any tax not assessed prior to said July 1, 1902.

Wherefore your petitioners aver that there is justly owing to them, on account of the matters herein set forth, the sum of Fifty-One Thousand, and Twenty-Nine and 54/100 dollars ($51,029.54), after deducting all just set-offs and demands on the part of the United States; and they further aver that they are the sole owners of the claim herein sued upon and that no transfer or assignments of said claim or any part thereof or interest therein, has ever been made; that they are citizens of the United States; that the petitioner Alexander Smith Cochran is a citizen of the State of New York residing in the City of Yonkers and the County of Westchester in said State; that

the petitioner William F. Cochran, Jr., is a citizen of the State of Maryland, residing in the County of Baltimore in said State, and that they have, at all times, borne true allegiance to the government of the United States and have in no way voluntarily aided, abetted or given encouragement to a rebellion against the United States and that they believe the averments in this petition to be true.

Prayers.

The premises considered, petitioners pray:

1. That this Honorable Court will render judgment against the United States for the said sum of Fifty-One Thousand and Twenty-Nine and 54/100 dollars ($51,029.54) in favor of the Petitioners.

25 2. That petitioners may have such other and further relief as the nature of the case may require and to this Honorable Court may seem meet and proper.

By H. T. NEWCOMB,
Attorney for Petitioners.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a notary public in and for the District of Columbia, H. T. Newcomb, who, being duly sworn according to law, deposes and says that he has been duly authorized to make oath in this cause, by power of attorney heretofore filed herein, that he has read and understands the foregoing petition, and that the matters and facts therein set forth are true in substance and in fact, as he is informed and believes.

H. T. NEWCOMB.

Subscribed and sworn to before me this twenty-first day of June, A. D. 1916.

CLARA G. EVANS,
Notary Public.

26 PETITIONERS' EXHIBIT A.

I, William F. Cochran, of the City of Yonkers, in the County of Westchester and State of New York, do hereby make, publish and declare this my last Will and Testament, hereby revoking all former Wills by me made.

First: I direct my Executors to pay all my just debts, funeral and testamentary expenses, out of my personal estate.

Second: I give and bequeath to my wife, Eva S. Cochran, absolutely, all my household goods and furniture, plates, books, paintings, engravings and other pictures, works of art, horses, carriages, sleighs, harness and equipments, which, at the time of my decease,

shall be at "Duneraggan" in the City of Yonkers, or at the premises Number Five East Forty-fifth Street in the City of New York, or which shall then be in use in connection with the use and occupation of either of said premises.

Third: I give and devise to my wife, Eva S. Cochran, absolutely, all that real property where I now reside; known as "Duneraggan," containing about twenty-two acres of land, with the buildings thereon at the time of my decease, situated in the City of Yonkers aforesaid, bounded on the East by Odell Avenue and North Broadway; on the South by lands late of Samuel J. Tilden, now deceased; on the West by the Croton Aqueduct property and on the North by Odell Avenue.

Fourth: I give and devise to my wife, Eva S. Cochran, for the term of her life, the house and premises Number Five East Forty-fifth Street, in the Borough of Manhattan, in the City of New York; and upon her decease I give and devise the said Forty-fifth Street premises to my heirs at law.

The provisions of this and the preceding clauses of my will in favor of my wife, are in lieu of dower.

Fifth: I direct my executors to set apart out of the Bonds, bearing interest at Five per centum per annum, which shall belong to me at the time of my decease, Thirty bonds of One Thousand dollars each, par value, and to hold the same in trust, to collect the interest thereon, and to pay the same in equal half yearly payments, from the time of my decease, to my niece, Louise C. De Wolf, dur-
27 ing her life, and upon her decease to pay over the capital of said trust fund to my next of kin according to the laws of the State of New York.

Sixth: I give and bequeath to my aunt, Mrs. E. M. Cochran, widow of James G. Cochran, deceased, now living at Houtenville, New Jersey, and in the event that she should not survive me, then to her daughter, Jennie, Twenty-five thousand dollars, to bear interest from the time of my decease, at the rate of four per centum per annum, payable quarterly.

Seventh: In acknowledgement of their long and faithful services, I give and bequeath to Peter MacDonald, my gardener, Three thousand dollars; to Marry Foley, One thousand dollars; to Cornelius Coughlin, One thousand dollars, and the said three bequests shall be paid without deductions of any legacy or transfer tax, which shall be paid out of my residuary estate, and said three bequests shall bear interest from the time of my decease, at the rate of four per centum per annum, payable quarterly.

Eighth: I give and bequeath to The Woman's Institute of Yonkers, Ten thousand dollars, to constitute or form part of the endowment fund of said institution, the income only to be applied to its uses; to The Church Mission of Deaf Mutes, in New York City, of which Thomas Gallaudet is President, Ten thousand dollars; to the Trustees of the Fund for the Relief of Widows and Orphans of De-

ceased Clergymen, and of Aged, Infirm and Disabled Clergymen of the Protestant Episcopal Church in the United States, Ten thousand dollars; to the Presbyterian Board of Relief for Disabled Ministers and the Widows and Orphans of Deceased Ministers, Ten thousand dollars; To the Young Mens Christian Association, of the City of Yonkers, for a building fund, Five thousand dollars.

I direct that no bequest in my will, to any society, association or corporation shall lapse by reason of its being incorrectly named in my Will, my Executors being hereby instructed to pay such bequests to such Society, Association or Incorporation, as shall, in their judgment be the one intended by me to take the said bequest.

Ninth: I authorize and direct my Executors to pay over to the Treasurer of "The Hollywood Inn," in the City of Yonkers, upon the order of the Library Committee of said institution, in
28 such sums as said Committee shall require from time to time, moneys to the extent of the excess of Ten thousand dollars over and above the aggregate of such moneys as I have advanced, or shall advance to said Institution for Library purposes, all such moneys paid to such Treasurer by my Executors, to be used for the purchase of books to constitute a Library suited to the purposes of the work of the said Institution; but such expenditures for books is subject to the provisions and conditions of the agreement of lease between me and the said Hollywood Inn, dated the Ninth day of April, one thousand eight hundred and ninety-six, and all books which may be purchased, as above provided, shall be considered a part of the furnishings and equipment of the building now occupied by the said Institution under said agreement and shall remain the property of myself and of my estate, unless title thereto shall be acquired, with the title to said building and the premises described in said agreement by said Hollywood Inn, in pursuance of the provisions of the said agreement.

Tenth: In the event that the Hollywood Inn in the City of Yonkers shall, at or before the expiration of six years, from the date of this my will, have become the owner of the premises, situated at the South West Corner of South Broadway and Hudson Street, in the City of Yonkers, and the premises adjoining the same on the South, mentioned and described in the lease of the same from me to it, bearing date April 9th, 1896, which lease contains provisions for the conveyance of the said premises to the said "Hollywood Inn," at the option of the said Institution, upon certain terms, and providing certain conditions shall have been fulfilled, then I give and bequeath to the said "The Hollywood Inn," the sum of One hundred thousand dollars, to constitute, or be added to, its endowment fund.

Eleventh: I have already given to my daughter, Anna C. Ewing, the sum of Twenty thousand dollars for the purchase of a residence, I therefore give and bequeath Twenty thousand dollars to each of my other children, namely: Elinor, the wife of Percy H. Stewart, Alexander Smith Cochran, William F. Cochran, Junior, Elizabeth Baldwin Cochran and Gifford Alexander Cochran.

Twelfth: I give and bequeath to my Executors, hereinafter named, their survivors and successors, the sum of Fifty thousand dollars, In Trust, to keep the same invested, as hereinafter directed, and during the life of my daughter, Elizabeth Baldwin Cochran, to pay over the net income thereof, in half yearly or quarterly payments, to the said Elizabeth or apply the same to her use.

And upon the death of the said Elizabeth, leaving a husband her surviving, to pay over, during the life of such husband, the net income of said fund, to such husband, or apply the same to his use, and upon his death, to divide the capital of said trust fund into so many equal shares as there shall be lawful children of the said Elizabeth surviving such husband, or who shall have died leaving lawful descendants surviving such husband, and to pay over One of such shares to each lawful child of the said Elizabeth surviving such husband, and One of such shares to the lawful descendants of each child of the said Elizabeth who shall have died leaving lawful descendants surviving such husband, per stirpes and not per capita.

And in the event of the death of the said Elizabeth leaving lawful descendants but no husband her surviving, to divide the capital of the said trust fund into so many equal shares as there shall be lawful children of the said Elizabeth her surviving, or who shall have died in her lifetime, leaving lawful descendants her surviving, and to pay over One of such shares to each lawful child of the said Elizabeth her surviving and one of such shares to the lawful descendants of each child of the said Elizabeth who shall have died in her lifetime leaving lawful descendants surviving the said Elizabeth per stirpes and not per capita.

And in the event of the death of the said Elizabeth leaving no lawful descendants and no husband her surviving, and in the event, that upon the death of any husband of the said Elizabeth who shall survive her, there shall be no lawful descendants of the said Elizabeth surviving such husband, then to pay over the entire capital of the said trust fund to my next of kin according to the laws of the State of New York.

Thirteenth: I give and bequeath to my Executors, hereinafter named, their survivor or successors, the sum of Fifty thousand dollars for each of my daughters, Anna C. Ewing, Elinor the wife of Percy H. Stewart, and Elizabeth Baldwin Cochran, (One hundred and fifty thousand dollars in all). In trust, to keep the sum of Fifty thousand dollars separately invested for each daughter, as hereinafter directed, and to pay over the net annual income thereof to the daughter for whom the same shall be invested or apply the same to her use during her life, and upon the death of each daughter to divide the capital of said fund set apart for her, into so many equal shares as there shall be lawful children of hers her surviving, or who shall have died in her lifetime, leaving lawful descendants her surviving, to pay over One of such shares to the lawful descendants of each child of such daughter, who shall have died in her lifetime leaving lawful descendants her surviving, per stirpes and not per capita, to pay over One of such shares to

each child of such daughter who shall survive her and who shall be Twenty-one years of age at the time of the death of such daughter, to retain in their hands One of such shares for each child of said daughter who shall survive her and who shall be under Twenty-one years of age at the time of the death of such daughter, to keep the same invested as hereinafter directed to apply so much of the net income of such share as in their judgment shall be needful, to the support, maintenance and education of such child and to accumulate the balance of such income until such child shall reach twenty-one years of age or die before that time, to pay over the capital of such share and all accumulations thereon to such child, upon such child's reaching twenty-one years of age, and in the event of such child dying before reaching twenty-one years of age, to pay over the capital of such share and all accumulations of income thereon to the lawful descendants of such child per stirpes and not per capita, and in the default of such descendants to my next of kin according to the laws of the State of New York.

Fourteenth: I give and bequeath to my Executors, hereinafter named, their survivor or successors, the sum of One hundred thousand dollars for each of my sons, Alexander Smith Cochran, William F. Cochran, Junior, and Gifford Alexander Cochran, (Three hundred thousand dollars in all) In Trust, to keep the sum of One hundred thousand dollars separately invested for each son, as hereinafter directed, and to pay over the net annual income thereof, to the son for whom the same shall be invested, or applying the same to his use during his life, and upon the death of each son, to divide the capital of the said fund set apart for him into so many equal shares, as there shall be lawful children of his him surviv-
31 ing, or who shall have died in his lifetime, leaving lawful descendants him surviving, to pay over one of such shares to the lawful descendants of each child of such son, who shall have died in his lifetime, leaving lawful descendants him surviving, per stirpes and not per capita, to pay over One of such shares to each child of such son who shall survive him, and who shall be twenty-one years of age at the time of the death of such son, to retain in their hands One of such shares for each child of said son who shall survive him and who shall be under twenty-one years of age at the time of the death of such son, to keep the same invested, as hereinafter directed, to apply so much of the net income of such share as in their judgment, shall be needful to the support, maintenance and education of such child and to accumulate the balance of such income until such child shall reach twenty-one years of age, or die before that time, to pay over the capital of such share, and all accumulations thereon, to such child upon such child's reaching twenty-one years of age, and in the event of the child's dying before reaching twenty-one years of age, to pay over the capital of such share, and all accumulations of income thereon, to the lawful descendants of such child, per stirpes and not per capita, and in default of such descendants, to my next of kin according to the laws of the State of New York.

The provisions of the preceding Twelfth, Thirteenth and of this

Fourteenth Clause of my will have been made in view of the fact that I have by deeds already placed in trust Fifty thousand dollars for each of my daughters, Anna, the wife of Thomas Ewing, Junior, and Elinor, the wife of Percy H. Stewart, and with the purpose that by virtue of said deeds and of this my will, the sum of One hundred thousand dollars shall be held in trust for each of my children.

Fifteenth: All the rest, residue and remainder of my estate, real and personal, and wheresoever situated, of which I shall die seized or possessed, or to which I shall be entitled at the time of my decease, I give, devise and bequeath to my wife, Eva S. Cochran, (and if she shall not survive me to my daughter Anna C. Ewing in her mother's place) and to my son Alexander Smith Cochran and my son William F. Cochran, Junior, and their survivors and successors, In Trust, Nevertheless, for the uses and purposes hereinafter mentioned:

32 I. To divide the said residuary estate into so many equal shares as there shall be children of mine me surviving and who shall have died in my lifetime leaving lawful descendants me surviving.

I direct my said trustees to apportion among the said shares, equally as near as may be, the capital stock and the scrip certificates of the Alexander Smith and Sons Carpet Company, which shall be owned by me at the time of my decease.

One of such shares of my residuary estate shall be set apart for each child of mine who shall survive me and One for the lawful descendants of each other child of mine who shall have died in my lifetime leaving lawful descendants me surviving.

II. To pay over, transfer and deliver to each child of mine who shall survive me, except my daughter Elinor, the wife of Percy H. Stewart, and except my son Gifford Alexander Cochran, in case he shall be under twenty-one years of age at the time of my decease, the share of my residuary estate set apart for such child, as hereinbefore provided, and I give, devise and bequeath each such share to each such child absolutely, in his or her own right, free, in the case of any daughter, from any right, title or interest therein, or control thereover, of any husband she may have.

III. To retain in their hands, the share of my residuary estate set apart for my daughter Elinor, the wife of Percy H. Stewart, to invest and to keep the same invested, as hereinafter provided, and collect the interest, rents, issues and income thereof, and during the life of the said Elinor, to pay over the net income and produce thereof, in half yearly or quarterly payments, to the said Elinor, or upon her written order, or to apply the same to her use, in such manner as a Court of competent jurisdiction shall direct, in case she shall at any time be incompetent or unable to receipt for or direct the payment of the same.

And upon the death of the said Elinor, after my decease, leaving lawful descendants her surviving, to divide the capital of the said share, of the said Elinor, into so many equal parts as there shall be

lawful children of hers her surviving, or who shall have died in her lifetime, leaving lawful descendants her surviving, to pay over One of such parts to the lawful descendants of each child of the said Elinor who shall have died in her lifetime, leaving lawful descend-
33 ants her surviving, per stirpes and not per capita; to pay over One of such parts to each child of the said Elinor, who shall survive her and who shall be twenty-one years of age at the time of the death of the said Elinor; to retain in their hands one of such parts for each child of the said Elinor who shall survive her and who shall be under twenty-one years of age at the time of the death of the said Elinor, to keep the same invested, as hereinafter directed, to apply so much of the net income of such part, as in their judgment shall be needful to the support, maintenance and education of such child, and to accumulate the balance of such income until such child shall reach twenty-one years of age, or die before that time; to pay over the capital of such part and all accumulations of income thereon, to such child, upon such child's reaching twenty-one years of age, and in the event of such child's dying before reaching twenty-one years of age, to pay over the capital of such part, and all accumulations of income thereon, to the lawful descendants of such child, per stirpes and not per capita, and in default of such descendants, to my next of kin according to the laws of the State of New York; and in the event of the death of the said Elinor, after my decease, leaving no lawful descendants, her surviving, to dispose of the capital of the share of the said Elinor as a part of my residuary estate.

And in case my said daughter, Elinor, shall die in my lifetime leaving lawful descendants me surviving, I direct my said trustees, their survivor or successors to divide the share of my residuary estate which would be set apart to such descendants into so many equal parts as there shall be lawful children of the said Elinor me surviving, or who shall have died in my lifetime leaving lawful descendants me surviving, to pay over one of such parts to the lawful descendants of each child of the said Elinor who shall have died in my lifetime, leaving lawful descendants me surviving, per stirpes and not per capita; to pay over one of such parts to each child of the said Elinor, who shall survive me and who shall be twenty-one years of age at the time of my decease, to retain in their hands one of such parts for each child of the said Elinor who shall survive me and who shall be under twenty-one years of age at the time of my decease, to keep the same invested, as hereinafter directed, to apply so much of the net income of such part, as in their judgment shall be needful to the support, maintenance and education of such
34 child, and to accumulate the balance of such income, until such child shall reach twenty-one years of age, or die before that time, to pay over the capital of such part, and all accumulations of income thereon, to such child upon such child's reaching twenty-one years of age, and in the event of such child's dying before reaching twenty-one years of age, to pay over the capital of such part, and all accumulations of income thereon, to the lawful descendants of such child per stirpes and not per capita, and in default of such

descendants to my next of kin according to the laws of the State of New York.

IV. To retain in their hands, in case my son Gifford Alexander Cochran shall be under twenty-one years of age at the time of my decease, the share of my residuary estate set apart for him, to invest and to keep the same invested, as hereinafter provided, and to collect the interest, rents, issues and income thereof, and out of the net income thereof, to apply and expend for the maintenance, support and education of my said son Gifford, the sum of three thousand dollars, or so much of said sum as shall be necessary, annually, during his minority, and to accumulate, during his minority, invest and keep invested the residue of such net income, and to pay over the principal of such share with all such accumulations, to my said son Gifford upon his reaching twenty-one years of age, and in the event of the death of my said son, Gifford, before reaching twenty-one years of age, leaving lawful descendants, him surviving, to pay over such principal, and accumulations, to such descendants, in equal shares per stirpes and not per capita, and in default of such descendants to my next of kin according to the laws of the State of New York.

V. To pay over, transfer and deliver the share set apart for the lawful descendants of any child of mine, except the said Elinor, who shall have died in my lifetime leaving lawful descendants me surviving to such descendant in equal shares, per stirpes and not per capita, to whom I give, devise and bequeath the same absolutely.

Sixteenth. My trustees may, in respect to the trusts created by this my will, retain, at their discretion, any securities or property belonging to my estate as an investment of the whole or any part of the trust funds, and may make, and from time to time, if the occasion requires, renew the investment of such funds, or of any part thereof, in such sound securities as prudent persons are in the habit of selecting for investment of their own funds, particularly in bonds secured by first mortgages on improved real estate in the City of New York, and in the mortgage bonds of sound dividend paying railroad companies but said trustees shall be under no obligation to invest the said trust funds in the particular kinds of security which the Courts of this State require in the absence of the permission given or intended to be given herein.

Seventeenth. I request that any member of my family who shall receive under this my will any of the Capital stock or certificates of script of the Alexander Smith and Sons Carpet Company, shall before selling the same, offer it to the other members of my family and be governed in the price to be asked from such other members by the judgment of the Trustees, for the time being, of the said Corporation.

Eighteenth. I give to my said Trustees, the survivors or survivor of them, and their successors, full power and authority to sell and convey all or any of the real property which shall, or may, form part of my residuary estate, at such time and in such manner and upon

such terms of sale as shall seem to them advisable, and to make, execute and deliver good and sufficient deeds of conveyance thereof.

Nineteenth. All needful and proper expenses of the administration of my estate, and of the trusts created by my will, including the compensation of a Secretary and bookkeeper, are to be paid out of my estate, until the final settlement of the same.

Twentieth. I do hereby nominate and appoint my wife, Eva S. Cochran (and if she shall not survive me, my daughter Anna C. Ewing, in her stead and place) and my sons Alexander Smith Cochran and William F. Cochran, Junior, Executrix and Executors of this my will, and I direct that they shall receive no statutory or other commissions or compensation for services as Executors and Trustees, beyond the sum of Ten thousand dollars to each.

I request that no bonds or other security shall be required from either of them, either as executors or as trustees.

In Witness Whereof, I have hereunto set my hand and seal at the City of New York, this Eighth day of March, in the year One thousand eight hundred and ninety-nine.

WILLIAM F. COCHRAN. [SEAL.]

36 Signed, sealed, published and declared by the said Testator, William F. Cochran, as and for his last Will and Testament in the presence of us, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses, adding thereto the places of our residence respectively, the day and year last above written.

MAITLAND F. GRIGGS,
75 East 54th St., New York City.
LEVI S. TENNEY,
Glen Ridge, New Jersey.
DUNCAN SMITH,
No. 101 Hudson Terrace, Yonkers, N. Y.

I, William F. Cochran, of the City of Yonkers, in the County of Westchester and State of New York, do hereby make, publish and declare the following as a Codicil to my last Will and Testament, which Will bears date the Eighth day of March, in the year One thousand eight hundred and ninety-nine.

First. I hereby revoke and annul the Twelfth clause of my said will, wherein and whereby I created a trust over the sum of Fifty thousand dollars for the benefit of my daughter, Elizabeth Baldwin Cochran, during her life, and for other uses and purposes after her death, and in the place and stead of the provisions of the said Twelfth clause, I hereby will and provide as follows:

I give and bequeath to my Executors, in said Will named, their survivors and successors, the sum of Fifty thousand dollars, In Trust, to keep the same invested as directed in my said Will as the investment of funds left by me in trust, and during the life of my daughter, Elizabeth Baldwin Cochran, to pay over the net income thereof

in half yearly or quarterly payments to the said Elizabeth, or apply the same to her use.

And upon the death of the said Elizabeth, leaving lawful descendants her surviving, to divide the capital of said trust fund into so many equal shares as there shall be lawful children of the said Elizabeth her surviving, or who shall have died in her lifetime leaving lawful descendants her surviving, and to pay over one of such shares to each lawful child of the said Elizabeth her surviving, and one of such shares to the lawful descendants of each child of the
37 said Elizabeth who shall have died in her lifetime, leaving lawful descendants surviving the said Elizabeth, per stirpes and not per capita.

And in the event of the death of the said Elizabeth leaving no lawful descendants her surviving, to pay over the entire capital of the said trust fund to my next of kin, according to the laws of the State of New York.

Second. In all other respects I hereby ratify, confirm and republish my said Will.

In Witness Whereof, I have hereunto set my hand and seal at the City of New York, thirteenth day of April, in the year One thousand nine hundred and one.

WM. F. COCHRAN. [SEAL.]

Signed, sealed, published and declared by the said Testator, William F. Cochran, as and for a Codicil to his last Will and Testament, in the presence of us, who, at his request, and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses, adding thereto the places of our residence respectively, the day and year last above written.

WILHELMINA M. MORSE,
Athenia, N. J.
HARFORD P. WALKER,
111 *E. 54th St., New York City.*
DUNCAN SMITH,
101 *Hudson Terrace, Yonkers, N. Y.*

Copy.

No. 5805.

STATE OF NEW YORK,
County of Westchester,
Surrogate's Office, ss:

I, David S. Murden, Deputy Clerk to the Surrogate's Court of said County, do hereby certify that I have compared the foregoing copy of the last will and testament and codicil of William F. Cochran, deceased, proven Jan'y 8th, 1902, with the original thereof now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original.

38 In testimony whereof, I have hereunto set my hand and affixed the seal of office of the Surrogate of said County, this 14th day of February in the year of our Lord one thousand nine hundred and twelve.

(Signed) DAVID S. MURDEN,
[SEAL.] *Deputy Clerk to the Surrogate's Court.*

PETITIONERS' EXHIBIT B.

The People of the State of New York to all to whom these presents shall come, or may concern, send Greeting:

Know ye, that at the Town of White Plains, in the County of Westchester, on the 9th day of January, in the year of our Lord one thousand nine hundred and two Letters Testamentary, of the Last Will and Testament and Codicil of William Francis Cochran late of the City of Yonkers, in said County, deceased, were duly granted and issued by the Surrogate of the County of Westchester to Eva Smith Cochran, William Francis Cochran, J. and Alexander Smith Cochran, Executors in said Will named and that the same are still valid and in full force.

In testimony whereof, the Seal of the Surrogate's Court of our said County of Westchester has been hereunto affixed.

Witness: Hon. William A. Sawyer, Surrogate of our said County, at the City of White Plains, the 24th day of April, in the year of our Lord one thousand nine hundred and sixteen.

(Signed) J. E. LANE,
Deputy Clerk of the Surrogate's Court.

39 II. *General Traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Submission of Case.*

On May 5, 1919, this case was submitted on merits, without argument, on stipulation, by Mr. H. T. Newcomb, for the claimants, and Mr. C. H. Bradley, for the defendants.

40 IV. *Findings of Fact and Conclusion of Law.*

Filed May 12, 1919.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following:

Findings of Fact.

I.

Alexander Smith Cochran and William F. Cochran are the duly appointed, qualified and acting surviving executors of the last will and testament of William F. Cochran, deceased, late a citizen of the United States and of the State of New York and a resident of the City of Yonkers in the County of Westchester in said State.

II.

The said decedent always was and his said surviving executors are and always have been loyal citizens of the United States. The said Alexander Smith Cochran is a citizen of the State of New York and a resident of the City of Yonkers in said State, and the said William F. Cochran is a citizen of the State of Maryland and a resident of the City of Baltimore in said State.

III.

Said William F. Cochran, deceased, died on December 27, 1901, leaving a valid last will and testament and codicil thereto which were duly admitted to probate and record on January 9, 1902, and letters testamentary thereupon issued to Eva Smith Cochran, Alexander Smith Cochran and William F. Cochran, as executrix and executors of said will. The said Eva S. Cochran has since deceased.

41 IV.

A copy of the said will and codicil is attached to the petition as exhibit "A" thereto, and is made a part of these findings by reference.

V.

All the legatees named in the fifth, sixth, eleventh, thirteenth, fourteenth and fifteenth paragraphs of the will and first paragraph of the codicil survived the testator and were still surviving on July 1, 1902. Louise C. DeWolf was forty-nine years of age when the tax was assessed, Alexander Smith Cochran was twenty-seven years of age, William F. Cochran was twenty-five years of age, Gifford A. Cochran was twenty-one years of age, Anna C. Ewing was thirty-one years of age, Elinor C. Stewart was twenty-nine years of age and Elizabeth B. Cochran was twenty-four years of age.

VI.

The six-months' notice provided for by statute of the State of New York, requiring persons having claims against the estate to present

them within the time specified by said notice, was given by the executors, by due publication, the first insertion in the newspapers being made on January 30, 1902. The time specified by the notice for the presentation of said claims expired on August 4, 1902.

VII.

Upon qualifying, as aforesaid, said executrix and executors came into the possession of the personal property of the estate of said decedent.

Prior to July 1, 1902, debts and claims against said estate were paid to the amount of $66,776.25.

42 Prior to July 1, 1902, expenses of administration were paid amounting to $13,047.16.

On June 15, 1902, the trust fund consisting of five per cent bonds in the amount of $30,000, provided for in the fifth paragraph in said last will for the benefit of Louise C. DeWolf, was set up.

On May 16, 1902, the sum of $500,000 was distributed to the trustees in payment of the legacies created by and the establishment of the trust created in the thirteenth and fourteenth paragraphs of the will, and the first paragraph of the codicil for testator's children, as follows:

Anna C. Ewing	$50,000.00
Elinor C. Stewart	50,000.00
Elizabeth B. Cochran	100,000.00
Alexander Smith Cochran	100,000.00
William F. Cochran, Jr.	100,000.00
Gifford A. Cochran	100,000.00
Total	$500,000.00.

On May 9, 1902, the sum of $23,011.10 was paid to Mrs. E. M. Cochran, legatee under the fifth paragraph of the will, and three legacies of less than $10,000 each, amounting in the aggregate to $5,074.06 were paid to other legatees.

Prior to July 1, 1902, the executors paid to the five residuary legatees, who were testator's children, the following amounts:

Alexander Smith Cochran	$431,328.00
William F. Cochran, Jr.	$431,328.00
Gifford A. Cochran	$431,328.00
Anna C. Ewing	$431,328.00
Elizabeth B. Cochran	$431,328.00

and to the trustees for the benefit of the daughter, Elinor C. Stewart, the like sum of $431,328.00, making an aggregate for the
43 six children of $2,587,968.00.

The aggregate of payments to legatees prior to July 1, 1902, was the sum of $3,140,979.10. The aggregate of payments of debts and claims against said estate and expenses of administra-

tion paid prior to July 1, 1902 was $79,823.41. The net personal estate of said decedent had a value of $7,918,027.18.

VIII.

In 1892 and 1893 the decedent became involved in litigation which has been continued against his estate. This litigation involves a claim against said estate for the recovery of real property held by the estate and for an accounting for profits. It was estimated that the complete recovery by the plaintiff would involve the estate in the payment of several hundred thousand dollars, some estimates largely exceeding this sum. This litigation is still in progress and on account of it money has been at all times retained by the executors that might otherwise have been distributed. Whether there is any probability of recovery by the plaintiff does not appear from the evidence.

IX.

Subsequent to decedent's death, and at some time prior to September 30, 1902, debts and claims against said estate had been ascertained and for the most part paid to the aggregate amount of $98,589.04, of which amount $66,776.25 was paid prior to July 1, 1902. During the same period funeral expenses aggregating $12,111.95 had been ascertained and in part paid. During said period expenses of administration had been ascertained aggregating the sum of about $125,000, of which amount the sum of $13,047.16 had been paid prior to July 1, 1902.

X.

On July 1, 1902, the amount of creditor's claims and
44 that of administration expenses had not been ascertained, except as aforesaid. There was no extraordinary or unnecessary delay in the administration of the estate.

XI.

Under the laws of the State of New York funds in the hands of executors after the expiration of the notice of publication are liable to after discovered debts. Legatees who have received moneys prior to the expiration of notice are liable, up to the amount paid them, for claims presented during the period of notice. The said executors, in making payments to legatees prior to July 1, 1902, as aforesaid, were not secured by bonds given therefor to said executors.

XII.

The value of the said residuary estate had not been ascertained prior to July 1, 1902, by the executors.

XIII.

In compliance with the requirements of section 30 of the act of June 13, 1898, the executors of said estate made a return giving a schedule of the legacies arising from the personal property of said estate and the amount of tax due thereon which was on February 17, 1903, signed by Alexander Smith Cochran, one of the executors, and acknowledged by him to be a just and true statement. This schedule was filed with the United States collector of internal revenue shortly thereafter and was accepted by him as correct, and the amount of tax paid to him was the amount estimated by the executors themselves as the amount of tax due.

On March 14, 1903, the said executors paid voluntarily to the United States collector of internal revenue for the fourteenth
45 district of New York, the sum of $158,321.78 as a tax in respect of legacies out of said estate and in the amounts as calculated to be due by the executors in making their said return, as follows:

On legacy to—	
Louise C. DeWolf	$216.43
Eva M. Cochran	1,187.50
Alexander Smith Cochran	28,383.10
William F. Cochran, Jr.	28,409.05
Gifford A. Cochran	28,456.00
Anna C. Ewing	27,129.53
Elinor C. Stewart	16,118.82
Elizabeth B. Cochran	28,421.32
Total	$158,321.78

All said sum of $158,321.78 was thereafter in the ordinary course of business of said collector paid and turned over to the United States.

XIV.

On July 16, 1904, Alexander Smith Cochran, one of the said executors, appealed to the Commissioner of Internal Revenue asking and demanding the repayment to the executors of said estate of said sum of $158,321.78 which said claim was on October 22, 1910, rejected by said officer. Subsequently, in March, 1915, the said executor asked for a reconsideration of the rejected claim and the Commissioner of Internal Revenue on April 23, 1915, recommended the claim for allowance in the sum of $107,292.24, and for rejection for the balance of $51,029.54. This recommendation was approved by the Secretary of the Treasury. Said sum of $107,292.24 was thereafter repaid to said executors by the United States, but the United States still retained and refused to refund the said $51,029.54.

XV.

46 On April 23, 1915, referring to the aforesaid claim, the said Commissioner of Internal Revenue reported to the Secretary of the Treasury as follows:

"I have the honor to submit for your consideration and action the claim of Alexander S. Cochran, Yonkers, N. Y., executor of the will of William F. Cochran, deceased, for the refunding of $158,321.78, tax paid on legacies, which claim was filed July 16, 1904.

"William F. Cochran died December 27, 1901, leaving a net personal estate of $7,918,027.18, which passed to various beneficiaries. Letters testamentary were issued the executor on January 9, 1902, and on July 1, 1902, the minimum legal period of administration under New York law had not expired, and the extent of creditors' claims and administration expenses had not been ascertained. Prior to that day the only distributions or payments to beneficiaries whose interests were taxed were as follows: An absolute payment of $23,011.10 to a stranger; the establishment of a trust of $30,000.00 for the life benefit of a niece; the creation of six trusts, life estates, for six children, two of the trusts being in the principal sum of $50,000.00 and four in the principal sum of $100,000.00; and the distribution of $431,328.00 on each of six shares of the residuary estate, all but one share being absolute and that one being a trust for a daughter's life benefit. Upon these absolute payments and the present worth of these vested trusts, total tax of $51,029.24, was due. The balance of the tax paid, $107,292.24, was paid on interests which, on July 1, 1902, in accordance with the decision of the Supreme Court in the "Dreer" case, were entirely contingent as to possession or enjoyment and is accordingly refundable to the claimant under the acts of June 27, 1902, and July 27, 1912.

47 "The claim is recommended for allowance for $107,292.24 and for rejection for $51,029.54 under the above mentioned acts."

The foregoing report and recommendations were approved by the Secretary of the Treasury.

XVI.

The said $51,029.54, retained by the United States as aforesaid, is made up as follows:

On account of legacy to—	Tax rate per $100.	In respect of life interest in trust fund.	In respect of absolute legacy.	Total.
Louise C. De Wolf.....	$1.50	$216.46	none	$216.46
Eva M. Cochran.....	5.00	none	$1,150.56	1,150.56
Alexander S. Cochran...	1.875	1,313.42	8,087.40	9,400.82
William F. Cochran.....	1.875	1,335.21	8,087.40	9,422.61
Gifford A. Cochran.....	1.875	1,374.70	8,087.40	9,462.10
Anna C. Ewing.....	1.50	506.15	6,469.92	6,976.07
Elinor C. Stewart.....	1.50	none	4,967.95	4,967.95
Elizabeth B. Cochran....	1.875	1,345.57	8,087.40	9,432.97
Total		$6,091.51	$44,938.03	$51,029.54

48

XVII.

On December 16, 1898, the Commissioner of Internal Revenue prescribed and promulgated certain general rules, tables, and instructions for the use of internal revenue officers, administrators, executors and trustees in determining the amount of taxes to be paid to the United States upon legacies or distributive shares arising from personal property under the revenue act of June 13, 1898, under which rules, tables, and instructions amounts due as taxes under said act were calculated to be as above stated. Said rules, tables, and instructions, so far as material to this case, are as follows:

(20442.)

Legacy Taxes.

Legacy tax accrues on an estate when testator died on or after June 13, 1898.—The New York transfer tax is not to be deducted from the amount of each legacy in determining the amount of the legacy tax.—Legacies in the nature of a life beneficiary interest and remainderman's interest are both taxable.

Treasury Department,

Office of Commissioner of Internal Revenue.

WASHINGTON, D. C., December 16, 1898.

SIR:

Your letter of the 12th instant, enclosing a letter from B. B. Blydenburgh, attorney for the estate of Franklin E. Taylor, deceased, has been received, stating that said testator died June 30, 1898, and asking a series of questions relative to said estate's liability to tax under the war-revenue act.

I reply as follows:

(1) This estate is subject to tax under the war-revenue act, the testator having died on or after June 13, 1898.

(2) The New York transfer tax is not to be deducted from the amount of each legacy in determining the amount of the legacy tax.

(3) Legacies in the nature of a life beneficiary interest and remainderman's interest are both taxable. The values of said interests are to be determined by approved tables, which have been prepared by the Government actuary. The tables referred to are published in this issue of Treasury Decisions, as decision No. 20443.

Legacy taxes are not payable until the legacy is payable, and the legacy must not be paid until the tax shall have been paid.

Respectfully, yours,

N. B. SCOTT,
Commissioner.

Mr. E. E. Moore, Collector, Brooklyn, N. Y.

49 [Series 7, No. 3—Revised, Supplement No. 1. United States Internal Revenue.]

Tables Showing the Present Worth of an Annuity, Life Interest, and of a Reversionary Interest, with Instructions for the Use Thereof in the Computation of Tax on Legacies and Distributive Shares.

(December 16, 1898. Washington Government Printing Office. 1898.)

[Series 7, No. 3—Revised, Supplement No. 1. United States Internal Revenue.]

Instructions Concerning the Tax on Legacies and Distributive Shares.

Treasury Department,

Office of the Commissioner of Internal Revenue.

WASHINGTON, D. C., December 16, 1898.

The following tables, showing the present worth of an annuity, life interest, and of a reversionary interest, with explanatory notes and examples, are hereby published and promulgated for the use of internal-revenue officers and administrators, executors, or trustees in determining the duty or tax to be paid to the United States upon legacies or distributive shares arising from personal property, imposed by the act of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes."

N. B. SCOTT,
Commissioner.

Approved:
O. L. SPAULDING,
Acting Secretary of the Treasury.

Legacy Taxes.—Table, Single-life, 4 Per Cent, Showing the Present Worth of an Annuity, or Life Interest, and of a Reversionary Interest, with Explanatory Notes and Examples.

[United States Internal-Revenue Adjustment, 1898.]

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
10	38.891	$19.45359	$0.21732
11	38.567	19.30943	0.21656
12	38.113	19.28184	0.21993
13	37.710	19.19865	0.22344
14	37.298	19.09580	0.22
15	36.877	18.99764	0.23086
16	36.447	18.89569	0.23478
17	36.010	18.79010	0.23884
18	35.565	18.68070	0.24305
19	35.113	18.56751	0.24740
20	34.652	18.45038	0.25191
21	34.186	18.32932	0.25656
22	33.711	18.20416	0.26138
23	33.230	18.07471	0.26636
24	32.742	17.94097	0.27150
25	32.248	17.80274	0.27682
26	31.747	17.65984	0.28231
27	31.239	17.51224	0.28799
28	30.725	17.35968	0.29386
29	30.205	17.20225	0.29991
30	29.678	17.03961	0.30617
31	29.147	16.87176	0.31262
32	28.608	16.69846	0.31929
33	28.067	16.51964	0.32617
34	27.516	16.33503	0.33327
35	26.961	16.14437	0.34060
50			
36	26.401	15.94755	0.34817
37	25.834	15.74427	0.35599
38	25.263	15.53421	0.36407
39	24.685	15.31722	0.37241
40	24.101	15.09295	0.38104
41	23.511	14.86102	0.38996
42	22.915	14.62122	0.39918
43	22.313	14.37356	0.40871
44	21.708	14.11860	0.41852
45	21.103	13.85713	0.42857

Legacy Taxes.—Continued.

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
46	20.499	13.58958	0.43886
47	19.896	13.31698	0.44935
48	19.298	13.03942	0.46002
49	18.703	12.75716	0.47088
50	18.113	12.47032	0.48191
51	17.527	12.17919	0.49311
52	16.947	11.88408	0.50446
53	16.372	11.58531	0.51595
54	15.804	11.28325	0.52757
55	15.243	10.99789	0.53931
56	14.689	10.66982	0.55116
57	14.143	10.35931	0.56310
58	13.603	10.04630	0.57514
59	13.072	9.73131	0.58726
60	12.549	9.41474	0.59943
61	12.029	9.09765	0.61163
62	11.532	8.78052	0.62382
63	11.039	8.46412	0.63600
64	10.557	8.14888	0.64812
65	10.088	7.83552	0.66017
66	9.630	7.52476	0.67212
67	9.185	7.21699	0.68396
68	8.753	6.91298	0.69565
69	8.333	6.61301	0.70719
70	7.926	6.31716	0.71857
71	7.532	6.02612	0.72976
72	7.151	5.74003	0.74077
73	6.782	5.45928	0.75157
74	6.425	5.18402	0.76215
75	6.081	4.91463	0.77251
76	5.749	4.65125	0.78264
77	5.428	4.39383	0.79254
78	5.119	4.14286	0.80220
79	4.823	3.89858	0.81159
80	4.537	3.66071	0.82074
81	4.262	3.42900	0.82965
82	3.995	3.20258	0.83836
83	3.737	2.98024	0.84691
84	3.484	2.76106	0.85534
85	3.236	2.54366	0.86371
86	2.992	2.32795	0.87200
87	2.752	2.11384	0.88024

Legacy Taxes.—Continued.

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
38	2.517	1.90115	0.88842
89	2.286	1.69107	0.89650
90	2.062	1.48540	0.90441
91	1.845	1.28432	0.91214
92	1.637	1.09024	0.91961
93	1.442	0.90647	0.92667
94	1.263	0.73687	0.93320
95	1.103	0.58435	0.93906
96	0.975	0.46182	0.94378
97	0.877	0.36698	0.94742
98	0.746	0.24038	0.95229
99	0.500	0.00000	0.96154

51 Example 1: A person dying bequeaths to his nephew, aged forty years, an annuity of one thousand dollars during life. What is the present value of the annuity?

Reference to the foregoing table shows that the present value of one dollar a year, payable at the end of each year during the life of a person aged forty years, is fifteen dollars nine cents two mills and ninety-five one-hundredths of a mill ($15.09295); therefore, the present value of one thousand dollars is one thousand times as much, or fifteen thousand and ninety-two dollars and ninety-five cents, the amount upon which tax accrues.

Example 2: A person dying bequeaths to his daughter, aged thirty-five years, a life interest in personal property amounting to fifty thousand dollars ($50,000), the estate to revert absolutely at her death to other parties. Required the present value, at the date of death of the testator, of the life interest of the daughter in the estate; also, required at the same date, the present value of the reversionary interest of said other parties in the estate.

At a net interest of four per cent per annum, the assumed rate, the estate of $50,000 will realize an income or annuity of $2,000 per annum. The present value of the sum of $100, payable at the end of each year during the life of a person aged thirty-five years, is found by the table to be $16.14437, and the present value of an annuity of $2,000 for the same time would be two thousand times as much, or $32,288.74, the amount upon which tax accrues.

The reversion or present value of $1.00, due at the end of the year of death of a person aged thirty-five years, is found by the table to

be $0.34060, and such value of $50,000 would be fifty thousand times as much, or $17,030, the amount upon which tax accrues.

NOTE.—This table is based on the "Actuaries' or Combined Experience Table," money being worth 4 per cent per annum.

The first column shows the age of the person under consideration.

The second column shows the corresponding "mean redemption period" and represents the time in years in which the present values of annuities and reversions certain will become equal, respectively, to the present values of annuities and reversions contingent on the duration of life.

The "mean redemption period" is a mean between the last payment of the annuity and the payment of the reversion, averaging six months later than the former payment and six months earlier than the latter payment.

The third column shows the present value of an annuity for life of one dollar per annum, the last payment being made at the end of the year prior to the one in which death occurs.

The fourth column shows the present worth of one dollar payable at the end of the year in which death occurs.

NOTE.—This adjustment has been prepared under the direction of Mr. J. S. McCoy, Government actuary.

52 *Present Value of Annuities and Reversions Certain Upon a 4 Per Cent Basis.*

Number of years.	Present worth of an annuity of one dollar, payable at the end of each year, for a certain number of years.	Present worth of one dollar, payable at the end of a certain number of years.
	Annuity.	Reversion.
1	$0.96154	$0.961538
2	1.88609	0.924556
3	2.77509	0.888996
4	3.62989	0.854804
5	4.45182	0.821927
6	5.24214	0.790314
7	6.00205	0.759918
8	6.73274	0.730690
9	7.43533	0.702587
10	8.11089	0.675564
11	8.76047	0.649581
12	9.38507	0.624597
13	9.98565	0.600574
14	10.56312	0.577475
15	11.11839	0.555265
16	11.65229	0.533908
17	12.16567	0.513373
18	12.65929	0.493628
19	13.13394	0.474642
20	13.59032	0.456387
21	14.02916	0.438834
22	14.45111	0.421955
23	14.85684	0.405726
24	15.24696	0.390121
25	15.62208	0.375117
26	15.98277	0.360689
27	16.32958	0.346816
28	16.66306	0.333477
29	16.98371	0.320651
30	17.29203	0.308319

Example: A man dies leaving personal property to the amount of $50,000, his daughter to have the income from it for 20 years; it then to revert to his youngest son. What is the present worth of these legacies?

The income from $50,000 would be $2,000 per annum, assuming money at 4 per cent.

The present worth of an annuity of $2,000 for 20 years will be 2,000 times an annuity of $1.00 for 20 years. In the table opposite

20 we find the value of an annuity of $1.00 to be $13.59032, therefore the present worth of an annuity of $2,000 will be $27,180.64.

A reversion of $1.00 at the end of 20 years is shown by the table to be $0.456387, and a reversion of $50,000 will be 50,000 times as much, or $22,819.35.

Motion for leave of Court to use and apply in this case certain information or papers certified from the Treasury Department in the case of Jennie Lathrop Rand, v. U. S., No. 32970.

Allowed subject to legal objections and without prejudice to rights of either party. June 11, 1918.

E. K. C.

53 XVIII.

The amount of said tax was assessed as hereinbefore stated on the monthly list for February, 1903, and return was made by the executors to the collector as follows:

(Here follows paster, marked pages 53 and 54.)

UNITED STATES INTERNAL REVENUE—LEGACIES AND DISTRIBUTIVE SHARES.

(Sections 29 and 30, act of June 13, 1898, as amended by sections 10 and 11 of an act approved March 2, 1901.)

Schedule of legacies or distributive shares arising from personal property of any kind whatsoever, being in charge or trust of Eva S. Cochran, Alex. Smith Cochran, and Wm. F. Cochran, jr., as executors and trustees, said property passing from William F. Cochran, of the city of Yonkers, county of Westchester, and State of New York, who deceased upon the 27th day of December, 1901, to the persons hereinafter mentioned, by will or by the intestate laws of ——; also the amount of such property, together with the amount of duty or tax which has accrued or should accrue thereon, agreeably to the provisions of the internal-revenue laws of the United States.

Appraised value of personal estate $8,108,679.46
Total amount legal debts and expenses to which the personal property is liable 190,652.28

Balance, clear value of personal estate 7,918,027.18

Lines.	Names of persons entitled to beneficial interest in said property. 1	Age. 2	Relationship of beneficiary to person who died possessed. 3	Clear value of legacy. 4	Legacies exempt. 5	Amount taxable. 6	Rate for every $100. 7	Amount of tax. 8	Remarks. 9
1	Eva S. Cochran		Wife	$5,723.00	$5,723.00				
2	Louis C. De Wolf	40	Niece	30,000.00		$15,308.59			
3	State tax					877.60			Remainder not presently taxable, as the persons to whom it may ultimately pass are undeterminable.
						14,430.99	$1.50	$216.46	
4	Mrs. E. M. Cochran		Stranger in blood	25,000.00		25,000.00			
5	State tax					1,250.00			
						23,750.00	5.00	1,187.50	
6	Peter McDonald		Stranger in blood	3,000.00	3,000.00				
7	Mary Harty (nee Foley)		do	1,000.00	1,000.00				
8	Cornelius Coughlan		do	1,000.00	1,000.00				
9	Womans Institute, Yonkers		Charitable, etc., corp'n.	10,000.00	10,000.00				
10	Church Mission to Deaf Mutes		do	10,000.00	10,000.00				
11	Trustees for the relief of widows and		do	10,000.00	10,000.00				
12	orphans of deceased clergymen and								
13	of aged, infirm, and disabled clergy-								
14	men of the Protestant Episc Church								

13	of U. S.								
16	Presbyterian Board of Relief for Disabled Ministers and the widows and orphans of dec'd ministers.		do	10,000.00	10,000.00				
17									
18									
19	Young Mens Christian Assoc., Yonkers		do	5,000.00	5,000.00				
20	"Holywood Inn," Yonkers, N. Y.		do	101,922.60	101,922.60				
21	Alexander Smith Cochran		Son	20,000.00		20,000.00			
22	Do.	27	do	100,000.00		70,048.96			Do
23	Do.		do	1,184,230.26		1,184,230.26			
						1,274,279.22			
24	State tax					12,807.71			
						1,261,471.51	2.25	28,383.10	
1	William F. Cochran, jr		Son	20,000.00		20,000.00			
2	Do.	25	do	100,000.00		71,210.96			Do
3	Do.		do	1,184,230.26		1,184,230.26			
						1,275,441.22			
4	State tax					12,816.76			
5						1,262,624.46	2.25	28,409.05	
6	Gifford A. Cochran		Son	20,000.00		20,000.00			
7	Do.	21	do	100,000.00		71,317.28			Do.
8	Do.		do	1,184,230.26		1,184,230.26			
						1,277,547.54			
9	State tax					12,836.61			
10						1,264,710.93	2.25	28,456.00	
11	Anna C. Ewing	31	Daughter	50,000.00		33,743.32			Do.
12	Do.		do	1,184,230.26		1,184,230.26			
						1,217,973.78			
13	State tax					12,216.63			
14						1,205,757.15	2.25	27,129.53	
15	Elinor C. Stewart		Daughter	$20,000.00		$20,000.00			Remainder not presently taxable, as the persons to whom it may ultimately pass are undeterminable.
16	Do.	29	do	50,000.00		34,404.30			
17	Do.	29	do	1,184,230.26		814,957.92			Do.
						869,362.42			
18	State tax					9,691.88			
19						859,670.54	$1.87½	$16,118.82	
20	Elizabeth B. Cochran		Daughter	20,000.00		20,000.00			
21	Do.	24	do	100,000.00		71,753.88			Do.
22	Do.		do	1,184,230.26		1,184,230.26			
						1,275,984.14			
23	State tax					12,824.34			
24						1,263,159.80	2.25	28,421.32	
	Total			7,918,027.16				158,321.78	

Dated at Yonkers, N. Y., this 17th day of February, 1903.

(Signed) ALEX. SMITH COCHRAN.

I do swear that the above statement is, to the best of my knowledge and belief, just and true, and that I have taken all the means in my power to make it so.

(Signed) ALEX. SMITH COCHRAN.

Subscribed and sworn to before me this 17th day of February, A. D. 1903.

MAITLAND F. GRIGGS,
Notary Public, N. Y. Co.,
Cert. filed in Westchester Co.

[SEAL.]

STATE OF NEW YORK,
County of New York, ss:

I, Thomas L. Hamilton, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify, that Maitland F. Griggs before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 25 day of Feby, 1903.

THOS. L. HAMILTON, *Clerk.*

[SEAL.]

Endorsement: 14 dist. 5 div. N. Y. Form No. 49, revised July 26, 1901. Legacy return. Estate of Wm. F. Cochran, deceased. Alex. Smith Cochran, executor. Total tax, $158,321.78. Reported for assessment on list for February, 1903. Examined and approved by me this 2d day of March, 1903. John G. Ward, collector. February, 1903, assessment list.

55 The amount of the tax shown in said return was paid as has been stated. The amounts were ascertained in said return in accordance with the rules, tables, and instructions above set forth. There was no special investigation by the Commissioner of Internal Revenue as to the expectancy of life of the several beneficiaries or as to the earning power of the bonds placed in trust for them respectively and for their benefit.

XIX.

Computation of the amount of $9,400.82, still retained by defendants in respect of the interest of the said Alexander Smith Cochran in said estate, was made in pursuance and in accordance with the rules, tables and instructions set out in Finding XVII, and there was not at any time any specific investigation by the Commissioner of Internal Revenue as to said Alexander Smith Cochran's expectancy of life or as to the earning capacity of the trust fund provided for his benefit out of said estate, otherwise than by the application of said tables. The value of the interest of said Alexander Smith Cochran in the trust fund of $100,000.00 provided for his benefit was determined from said tables to be $70,048.96, to which was added $431,328.00 the sum paid to him prior to July 1, 1902, producing a total of $501,376.96, upon which the tax was calculated at the statutory rate of $1.875 per hundred dollars.

XX.

Computation of the amount of $9,422.61, still retained by the defendants in respect of the interest of the said William F. Cochran in said estate, was made in pursuance and in accordance with the rules, tables and instructions set out in Finding XVII, and there was not at any time any specific investigation by the Commissioner of Internal Revenue as to said William F. Cochran's expec-
56 tancy of life or as to the earning capacity of the trust fund provided for his benefit out of said estate, otherwise than by the application of said tables. The value of the interest of said William F. Cochran in the trust fund of $100,000.00 provided for his benefit was determined from said tables to be $71,210.96, to which was added $431,328.00, the sum paid to him prior to July 1, 1902, producing a total of $502,538.96, upon which the tax was calculated at the statutory rate of $1.875 per hundred dollars.

XXI.

Computation of the amount of $9,462.10, still retained by the defendants in respect of the interest of the said Gifford A. Cochran in said estate, was made in pursuance and in accordance with the rules, tables and instructions set out in Finding XVII, and there was not at any time any specific investigation by the Commissioner of Internal Revenue as to said Gifford A. Cochran's expectancy of life or as to the earning capacity of the trust fund provided for his benefit

out of said estate, otherwise than by the application of said tables. The value of the interest of said Clifford A. Cochran in the trust fund of $100,000.00 provided for his benefit was determined from said tables to be $73,317.28, to which was added $431,328.00, the sum paid to him prior to July 1, 1902, producing a total of $504,645.28 upon which the tax was calculated at the statutory rate of $1.875 per hundred dollars.

XXII.

Computation of the amount of $6,976.07, still retained by the defendants in respect of the interest of the said Anna C. Ewing in said estate, was made in pursuance and in accordance with the rules, tables and instructions set out in Finding XVII, and there was not at any time any specific investigation by the Commissioner of Internal Revenue as to said Anna C. Ewing's expectancy of
57 life or as to the earning capacity of the trust fund provided for her benefit out of said estate, otherwise than by the application of said tables. The value of the interest of said Anna C. Ewing in the trust fund of $50,000.00 provided for her benefit was determined from said tables to be $33,743.52, to which was added $431,328.00, the sum paid to her prior to July 1, 1902, producing a total of $465,071.52 upon which the tax was calculated at the statutory rate of $1.50 per hundred dollars.

XXIII.

Computation of the amount of $9,432.97, still retained by the defendants in respect of the interest of the said Elizabeth B. Cochran in said estate, was made in pursuance and in accordance with the rules, tables and instructions set out in Finding XVII, and there was not at any time any specific investigation by the Commissioner of Internal Revenue as to said Elizabeth B. Cochran's expectancy of life or as to the earning capacity of the trust fund provided for her benefit out of said estate, otherwise than by the application of said tables. The value of the interest of said Elizabeth B. Cochran in the trust fund of $1,000,000.00 provided for her benefit was determined from said tables to be $71,763.88, to which was added $431,328.00, the sum paid to her prior to July 1, 1902, producing a total of $503,091.88 upon which the tax was calculated at the statutory rate of $1.875 per hundred dollars.

XXIV.

Computation of the amount of $4,967.95, still retained by the defendants in respect of the interest of Elinor C. Stewart in said estate, was made in pursuance and in accordance with the rules, tables and instructions set out in Finding XVII, and there was not at any time any specific investigation by the Commissioner of Internal Revenue as to said Elinor C. Stewart's expectancy of life or as to the
58 earning capacity of the trust fund provided for her benefit out of said estate, otherwise than by the application of said tables.

The value of the interest of said Elinor C. Stewart in the trust fund of $50,000.00 provided for her benefit was determined from said tables to be $34,404.50, and the value of the interest of said Elinor C. Stewart in the trust fund of $431,328.00, the sum paid to trustees for her benefit on account of her interest in the residuary estate, prior to July 1, 1902, was determined from said tables to be $296,792.48, producing a total of $331,196.98 upon which the tax was calculated at the statutory rate of $1.50 per hundred dollars.

XXV.

The first payments of income from the trust fund of $30,000, bequeathed for the benefit of Louise C. DeWolf, were paid to her by the trustees as follows: $750 on July 1, 1902, which had been received by said trustees prior to said date and was accrued income from said fund for the preceding six months; $125 on July 1, 1902, the same being an advance on account of income from said fund.

The trustees of the fund providing for the benefit of Elinor C. Stewart received prior to July 1, 1902, on account of the principal of said trust fund, as hereinbefore indicated, the sum of $431,328, and also received prior to said date from said fund accrued interest or income to the amount of $35,276.86. On February 25, and April 11, 1902, the said trustees paid to said Elinor C. Stewart on account of her interest or right to income from said trust fund the sums of $10,000 and $20,000, respectively.

Conclusion of Law.

Upon the foregoing findings of fact the court concludes as matter of law that the plaintiff executors are not entitled to recover and that their petition ought to be, and it is, dismissed, with
59 judgment against the plaintiff executors for the cost of printing the record in this cause, the amount thereof to be entered by the Chief Clerk and collected by him according to law.

60 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Twelfth day of May, A. D., 1919, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge and decree that Alexander Smith Cochran and William F. Cochran, as executors of the last will and testament of William F. Cochran, deceased, as aforesaid, are not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and it hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from Alexander Smith Cochran and William F. Cochran, as executors of the last will and testament of William F. Cochran, de-

ceased, as aforesaid, the sum of Three hundred and sixty-eight dollars and forty-four cents ($368.44), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

VI. *Claimants' Application for and Allowance of an Appeal to the Supreme Court.*

Come now the plaintiffs by their attorney, and pray an appeal to the Supreme Court of the United States from the judgment entered herein on the Twelfth day of May, nineteen hundred and nineteen, dismissing plaintiffs' petition, and against plaintiffs for the cost of printing the record in this Court.

H. T. NEWCOMB,
Attorney for Plaintiffs.

Filed May 19, 1919.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

May 19, 1919.

61 Court of Claims.

No. 33302.

ALEXANDER SMITH COCHRAN and WILLIAM F. COCHRAN, as Surviving Executors of the Last Will and Testament of William F. Cochran, Deceased,

vs.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the submission of the case; of the findings of fact and conclusion of law filed by the court; of the judgment of the court; of the claimants' application for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twenty-ninth day of May, A. D., 1919.

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

[Seal Court of Claims.]

Endorsed on cover: File No. 27,144. Court of Claims. Term No. 390. Alexander Smith Cochran and William F. Cochran, as surviving executors of the last will and testament of William F. Cochran deceased, appellants, vs. The United States. Filed May 31st, 1919. File No. 27,144.

Supreme Court of the United States

OCTOBER TERM, 1920

No. 116

ALEXANDER SMITH COCHRAN and WILLIAM F. COCHRAN, as surviving executors of the Last Will and Testament of WILLIAM F. COCHRAN, deceased,

Appellants

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR APPELLANTS

H. T. NEWCOMB,
Attorney for Appellants.

FREDERICK L. FISHBACK,
Of Counsel.

CHAS. P. YOUNG CO., PRINTERS, 190 William St., N. Y.

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LIST OF CITATIONS.

Supreme Court of the United States

October Term, 1920.

No. 116.

ALEXANDER SMITH COCHRAN and WILLIAM F. COCHRAN, as surviving executors of the last Will and Testament of WILLIAM F. COCHRAN, deceased, Appellants,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

Status.

This is a suit, under the Act of July 27, 1912 *(37 Stat. 240)*, to enforce against the United States claim for the sum of $51,029.54, exacted from appellants, who were the petitioners in the Court of Claims, on March 14, 1903, under color of the legacy tax provisions of the Act of June 13, 1898 *(30 Stat. 448, 464-5)*.

The case is here on appeal from the Court of Claims which dismissed the petition, without an opinion *(R. 43-4)*.

Statutes.

The relevant statutes and portions of statutes are to be found in the Record *(pp. 1-4)*.

Question at Issue.

Only one question is now presented for determination, namely—

Could any sum be lawfully collected as a legacy tax, under the Spanish War Revenue Act of June 13, 1898, and amendments, unless there was an assessment before July 1, 1902, the date on which the law establishing the tax was repealed?

Additional questions were discussed in the Court of Claims but in view of subsequent decisions by this Court *(Henry v. United States, 251 U. S., 393; Simpson v. United States, 252 U. S., 547)* they do not appear to be open upon this Record.

Facts.

Appellants are the surviving executors of the will of William F. Cochran, deceased, late a citizen and resident of the State of New York, who died, testate, on December 27, 1901 *(R. 28)*. His will was probated on January 9, 1902 *(R. 27, 28)* and letters testamentary issued the same day *(R. 27, 28)*. The six months' notice to creditors required by the laws of New York was first published on January 30, 1902 *(R. 29)*, and the time specified for presentation of claims expired on August 4, 1902 *(R. 29)*.

There was no extraordinary or unnecessary delay in the administration of the estate *(R. 30)*, but

the estate was involved in litigation *(R. 30)* and prior to July 1, 1902, the debts and expenses of administration had not been fully ascertained *(R. 30)*, nor had the value of the residuary estate of the decedent been ascertained *(R. 30)*. Prior to July 1, 1902, the said executors made certain advances, or payments, in anticipation of, or on account of, legacies, but on said date more than half of the personal estate of said decedent remained undistributed *(R. 29-30)*.

"Assessment" of a legacy tax in the sum of $158,321.78 *(R. 31)* was made during February, 1903 *(R. 40)*, on the basis of a return made by one of the executors on February 17, 1903 *(R. 31)*. This sum was paid by appellants to the Collector of Internal Revenue on March 14, 1903 *(R. 31)*, and was turned into the Treasury *(R. 31)*. This "assessment" was illegal, as was subsequently admitted by the Treasury Department, which, on April 23, 1915, allowed a refund to appellants of $107,292.24 *(R. 31-2)*, which amount of $107,292.24 was actually refunded *(R. 31)*.

The amount now sued for, $51,029.54 *(R. 32)* is the whole amount now retained by the United States on account of the "assessment" of February, 1903 *(R. 31-2)*.

This sum of $51,029.54 was computed in respect of the interests of eight different legatees *(R. 32, 41-3)* of whom six were residuary legatees *(R. 28, 19-24)*. The computations were made according to "certain general rules, tables and instructions" *(R. 33)* prescribed by the Commissioner of Internal Revenue *(R. 33-40)* and to the extent that these rules, tables and instructions were applicable there was no additional inquiry as to the value

of the interests affected *(R. 41-3)*. The interests thus taxed included several separate life interests in different trust funds *(R. 28, 18, 20-5, 29, 32, 41-3)*.

Appeal was duly made to the Commissioner of Internal Revenue for the refund of said $51,029.54, as required by *R. S. 3220, 3226, 3227 and 3228*, and the *Act of July 27, 1912*, and denied on or after April 23, 1915 *(R. 31-2)*, and this suit was begun on June 23, 1916 *(R. 1)*.

Argument.

Appellants consider that, upon the facts above stated, they are entitled to recover the entire amount claimed *for the reason that there was no assessment of any legacy tax against them or the estate which they represent until after July 1, 1902, the date on which the law establishing the tax was repealed.*

The argument in support of the foregoing divides naturally under two propositions, which will be examined separately and in order. These propositions are:

A. There was not at any time due to the United States, from appellants, or the estate they represent, by reason of the legacy tax provisions of the Act of June 13, 1898, and amendments, "a sum either certain or readily reduced to a certainty" (United States v. Chamberlin, 219 U. S. 250) and therefore they were under no liability or obligation to pay any tax unless and until the amount thereof should be fixed by a lawful assessment.

B. No lawful assessment under the legacy tax

provisions of the Act of June 13, 1898, and amendments, could be made in February, 1903, or at any time after July 1, 1902, the date on which the tax was repealed.

A.

There was not at any time due to the United States, from appellants, or the estate they represent, by reason of the Legacy Tax provisions of the Act of June 12, 1898, and amendments, "a sum either certain or readily reduced to a certainty" (*United States v. Chamberlin, 219 U. S. 250*) and therefore they were under no liability or obligation to pay any tax unless and until the amount thereof should be fixed by a lawful assessment.

The rule that, where uncertainty exists, there must be quasi-judicial assessment in order to impose a tax was declared by this Court in *People v. Weaver, 100 U. S. 539*, the opinion adopting words of Judge COOLEY (*Cooley on Taxation, 1st ed., 258-9*) in order to say:

> "When taxes have been properly decided upon, an assessment may become *an indispensable proceeding in the establishment of any individual charge*, against either person or property. This is always requisite when the taxes are to be levied in proportion to an estimate either of values, of benefits, or the results of business." *100 U. S. 539, 545.*

In the second edition of the great work from which the foregoing was taken, the last which he was able to revise, Judge Cooley reiterated the principle, as follows:

> "An assessment, when taxes are to be levied upon a valuation, is obviously indispensable. It is required as the *first step* in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support and are nullities." *Cooley on Taxation, 2d Ed., 352.*

The foregoing is repeated *verbatim* in the third (and last) edition *(597)*.

It will not be doubted that taxes are of two sorts, namely, (1) those which can be enforced without assessment (in the ordinary sense of a quasi-judicial proceeding and (2) those which require such an assessment in order to establish liability or obligation on the part of any individual. Taxes of the first sort can be collected, without prior assessment, in an action of debt, while a lawful assessment is the necessary foundation of any proceeding to collect a tax of the second sort. In *United States v. Chamberlin, 219 U. S. 250*, **in which it was held that the stamp tax based upon "the consideration or value" of real property conveyed by deed, etc., established by the Act of June 13, 1898** *(30 Stat. 448)*, **could be collected in an action of debt, it was observed that**

> **"The statute now before us fixes a tax of a specified amount, according to the consideration or value of the lands conveyed."** ***219 U. S. 250, 264.***

The general principle applicable to such cases is stated, in the same opinion, as follows:

> "Whether an action of debt is maintainable depends not upon the question who is the plaintiff or in what manner the obligation was incurred, but it lies whenever there is due a sum either certain or readily reduced to certainty." *219 U. S. 250, 262-3.*

The foregoing is immediately followed by a reference to *Stockwell v. United States, 13 Wall. 531, 542*, a case involving the Tariff Act of March 3, 1823 *(3 Stat. 781)*, where the following appears:

> "Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount." *13 Wall. 531, 542.*

The last clause of the foregoing states the well-established limitation of an action of debt. It lies only when

> "• • • the sum to be recovered is certain or may readily be ascertained either from the contract itself or by operation of law." *13 Cyc. 405.*

It does not lie when the amount due would have to be determined by resort to extrinsic evidence.

> "• • • where the sum must be ascertained by resorting to extraneous evidence by the tribunal before which the suit is brought the action cannot be maintained; and if the action is brought upon specialties the instrument itself must with clearness and certainty fix the *quantum* of the debt or furnish

such data as will infallibly lead to an ascertainment thereof." *13 Cyc. 407.*

Thus the present significance of the decision in *Chamberlin's Case, supra,* appears to be that the ordinary process of quasi-judicial assessment, applied to the special facts of the particular case, may be omitted in cases in which an action of debt not based upon an assessment can be maintained. That is to say, such assessment is not required to create liability for a tax in those instances in which it is plain that the opportunity it affords would be of no genuine benefit to the taxpayer. This can only occur in cases in which the amount that should be paid is so certain (or capable of such ascertainment) that reasonable minds could not disagree and that the exercise of judgment and the consideration and weighing of evidence could not affect the result. Such is the principle laid down in *Hager v. Reclamation District, 111 U. S. 701, infra, 12-3.*

The cases cited in the opinion in *Chamberlin's Case, supra, (219 U. S. 263-4)* support the conclusion that the rule of that case is not to be considered applicable where the certainty there relied upon is lacking. Thus *Dollar Savings Bank v. United States, 86 U. S. 227,* the leading case in this series, involved a bank tax of five per cent

> "on all undistributed sums made and added during the year to their surplus or contingent fund." *Act of July 13, 1866, 14 Stat. 98, 138.*

Mr. Justice Strong, speaking for the majority of the Court, said:

> "No other assessment than that made by

> the statute was necessary to determine the extent of the bank's liability." *86 U. S. 227, 240.*

And

> "There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank and without more it made the bank a debtor." *86 U. S. 227, 241.*

It is worth noting that even under the circumstances of the case cited, Mr. Justice FIELD and Mr. Justice BRADLEY, dissenting, considered that

> "The assessment-roll should be regarded as conclusive as to the persons or things liable to taxation." *86 U. S. 227, 241.*

In *King v. United States*, *99 U. S. 229*, and in *United States v. Erie Railway*, *107 U. S. 1*, the tax was one of five per cent upon interest paid on bonds of railway companies *(Act of July 13, 1866, 14 Stat. 98, 138)*. In *United States v. Philadelphia & Reading*, *123 U. S. 113*, it appears to have been assumed, without immediate consideration, that the same rule applied to a tax on the amount of undivided profits *(Act of June 30, 1864, as amended by Act of July 13, 1866; 13 Stat. 223, 284; 14 Stat. 93, 138)*, always to be definitely stated in accurate accounting. In *United States v. Snyder*, *149 U. S. 210*, also cited in *Chamberlin's case, supra*, there was actually an assessment:

> "• • • these taxes were duly assessed and certified to the Collector of Internal Revenue, who made demand for payment." *149 U. S. 210, 210.*

The foregoing are all the cases cited, on this point, in the opinion in *Chamberlin's case, supra.* Apparently there is *only one other decision* of this Court in which it is held that any internal revenue tax could be imposed other than by assessment. In *United States v. Ferrary, 93 U. S. 625,* it was held that liability for a tax of fifty cents per gallon on eighty per cent of the capacity of a distillery, as shown by an official survey, a copy of which must be furnished to the distiller *(Act of July 20, 1868; 15 Stat. 125, 127),* is within the same principle.

> "The law fixed the rate at fifty cents for each gallon of spirits produced, and the survey and estimate which was furnished him informed him of the producing capacity of his distillery, and made it his duty to pay the tax on at least eighty per cent of that. Thus the law fixed both the *rate* and *amount.*" *93 U. S. 625; 23 L. ed., 832, 833.*

United States v. Tilden, 9 Ben. 358; 28 Fed. Cas. 161, No. 16,519, decided in 1878, is also cited in *Chamberlin's case, supra.* That case, also, is consistent with the view that in order to avoid the requirement as to assessment there must be certainty as to the amount.

> "A scheme of taxation like that found in the Federal statutes, where there is imposed, by the statute a fixed tax, *by a percentage on an amount of money,* the elements for ascertaining which are definitely designated in the statute, *or a fixed tax of a given amount on a designated object or subject of tax,* is *a very different scheme of taxation* from that which prevails generally in the States, where power

> is confided to public officers to value property, real or personal, and to fix the percentage of tax thereon. *There no tax is imposed till the officers act*, and no suit for any tax will lie till after such action by the officers." *United States v. Tilden, 28 Fed. Cas. No. 16519, 161, 168.*

It will scarcely be suggested that the distinction expressed in the foregoing depends upon the authority by which the power to tax is exercised, that is to say, it will not be urged that assessment may be dispensed with *because a tax is levied under Federal authority* when, if the same tax were levied under State authority, assessment would be essential. On the contrary, the distinction obviously arises from the nature of the tax or, more precisely, in the case of a tax depending upon a percentage rate, *upon the subject matter of the tax.* In other words, it depends upon whether the subject of taxation is one having such certain or clearly ascertainable value that the ordinary processes of assessment would be superfluous in that they could not alter the amount which the taxpayer would be required to pay. Where such certainty or capacity of ascertainment exists, assessment may be dispensed with. Where it is lacking, assessment is fundamental and the first step in fastening liability upon any individual or subject of taxation.

There is conceived to be a plain line of separation between those taxes which (1) must rest upon a valuation necessarily involving the exercise of judgment and (2) those either specific in form as well as substance or, while *ad valorem in form*, depending upon factors that are so fixed or cer-

tain that the tax is actually *specific in its intrinsic character*. This separation has often been judicially noted and applied as the test for determining whether particular assessment should be required. The distinction has been admirably illustrated, in words later adopted by the Supreme Court of Vermont, as follows:

> "But in the case of taxes laid upon solvent securities, certificates of deposit, mortgages, undivided profits, or the like, *the nominal or face value of which is identical with the actual value*, the assessment may be made by the legislature without the intervention of assessing officers. *27 Ency. Law 663.*" *State v. Clement National Bank, 84 Vt. 167, 182.*

It will be noted that *the identity of the face value and the actual value* is made the basis of the illustration of the test of the power of the legislature to make assessment. This distinction is also recognized in *Hager v. Reclamation District, 111 U. S. 701*, where the test of necessity for particular assessment by the quasi-judicial process seems to be whether the amount of the tax

> "could be changed by hearing the taxpayer." *111 U. S. 701.*

Mr. Justice FIELD, speaking for the Court in that case said:

> "Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business) and generally, specific

taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and *nothing could be changed by hearing the taxpayer.* No right of his is therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind or at a particular place, such as keeping a hotel or restaurant or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. ***In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.***

"But where a tax is levied on property, not specifically but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially, * * * ." *111 U. S. 701.*

It seems requisite to conclude, from the foregoing, that unless a legacy consisted of—

> "—a sum requiring no future valuation to settle its amount" *(Stockwell v. United States, 13 Wall. 531, 542)*,

an assessment was absolutely essential before there could be the certainty necessary to support an action of debt, which is equivalent to saying, before there could be any liability to pay the tax or any right to make the collection. It remains to inquire whether there was such certainty in the instant case.

As already noted, *(supra, 3-4)* the $51,029.54 claimed herein was collected in respect of eight different interests in the estate represented, six of which were the interests of residuary legatees. On July 1, 1902, the time to prove claims against the estate had not expired *(R. 28-9)*, litigation affecting the amount of the estate was in progress *(R. 30)*, many claims and expenses of administration, amounting to a large aggregate were still to be ascertained *(R. 29-30)*, and "the value of the said residuary estate had not been ascertained *(R. 30)*. It could not have been ascertained. The law of the State of New York, where appellants' testator had his domicile, as declared by its highest court, is as indicated by the two following quotations:

> "* * * there had been no settlement of the executor's accounts under the will, and, consequently, the amount of the residuary estate, if any there should be, was unascertained." *Matter of Zefita, 167 N. Y. 280, 283.*

"And until this residuary estate was ascertained by an accounting of the executors, the legatee might not be even able to maintain an action for its recovery. It would appear, therefore, that a tax in this proceeding has been levied upon a legacy which not only had never been realized, but the right to the possession of which had never accrued." *Matter of Phipps, 77 Hun. 325; affirmed, "on the opinion below," 143 N. Y. 641.*

In the case last above quoted an order fixing a State inheritance tax was reversed.

A few extracts from decisions under laws of other States will serve to illustrate the condition of uncertainty which made assessment essential to the imposition of a tax in this case.

"Though called a residuary legacy generally, it can hardly be called a legacy in the ordinary sense of the term; for the words 'rest' and 'residue' can only apply to that which remains after the payment of debts, legacies proper, and legal charges." *Nash v. Ober, 2 App. D. C. 304, 308.*

"The executors claim, however, that there were no debts against the estate, save for funeral expenses and medical attendance, * * * but they could not legally know that fact until a year after publication of notice of their appointment." *Montgomery v. Gilbertson, 134 Iowa 291, 296.*

See, also;

Orcutt's Appeal, 97 Pa. St. 197;
Coleman's Estate, 159 Pa. St. 231, 233.

Moreover, the legacies were not simple legacies of definite amounts but included interests of varying character in amounts or funds still indefinite and of uncertain and indefinite value. *These values could be estimated but not ascertained.*

For example, the sum of $9,400.82 (part of the $51,029.54 sued for, *R. 32*) was collected in respect of interests passing to Alexander S. Cochran, one of the sons of the decedent. The record shows *(R. 21, 28)* that his interest consisted, in part, of a life interest in a trust fund, the remainder in which was also disposed of by the will. Such an interest is not susceptible of reduction to a sum certain. A suit to recover a tax in respect of such a legacy, unless the suit was preceded by an assessment, would necessarily involve a "future valuation" *(Stockwell v. United States, 13 Wall. 531, 542).*

> "A life estate or legacy for life is the income or interest of a certain fund consisting of profits to be earned, which income is uncertain in amount. It is not a fixed sum, nor to be made a sum certain." *Peck v. Kinney, 143 Fed. 76, 80.*

In the instant case, even the amount of the fund was uncertain, and unascertainable, on July 1, 1902, and remained uncertain, and unascertainable, long after that date.

This legatee was thus entitled to the income of a fund during the uncertain period of his life. What it would annually earn would continue uncertain; how long he would live was even more uncertain.

"This day may *possibly* be my last; but the

laws of probability, so true in general, so fallacious in particular, still allow about fifteen years." *Edward Gibbon, "Memoirs of My Life and Writings, Euclid Edition, Vol. I, pp. 204-5.*

An assessment could assign a value to the resultant of these uncertainties just as it is frequently necessary to weigh chances and probabilities and give definiteness to the result which best satisfies the judgment of those upon whom the task devolves.

> "The tax is imposed according to the value of the legacy and collateral inheritance liable to be taxed, and hence there must be some mode of ascertaining that value; and for that purpose *judicial action is requisite at some stage of the proceeding before the liability of the taxpayer becomes finally fixed.* He must have some kind of notice of the proceeding against him, and a hearing or opportunity to be heard in reference to the value of his property, and the amount of the tax which is thus to be imposed. Unless he has these, his constitutional right to due process of law has been invaded." *Matter of McPherson, 104 N. Y. 306, 321.*

But chance is not reduced to certainty by such a process—in truth the closest approximation to certainty evolved is that the actuality will not coincide with the estimate.

> "For we know as well as any actuary could know, that in order to determine the present value of any limited estate, or income, or annuity, both the annual amount and the duration thereof must be known; or, the amount

> must be known and the duration capable of being averaged by the mortality tables. Here both these facts are unascertainable. * * *" *Re Estate of Clark, 270 Mo. 351, 362.*

> "The valuation of both the income and the reversion were necessarily based upon contingencies, some only of which were considered, while others were ignored. Valuations thus reached must necessarily be uncertain." *Shanley v. Herold, 141 Fed. 423, 429; affirmed, 146 Fed. 20.*

Except the future duration of an existing life, scarcely anything more surely eludes foresight than the future interest rate to be earned by sound investments. In other words, the "present value," for taxation purposes, or for any other purpose, of a life interest in a trust fund is never certain or ascertainable—it is a matter of opinion and judgment—its estimation involves questions and problems on which the wisest and most experienced may reasonably disagree. In such case, it is submitted, every taxpayer is entitled to a particular assessment, based upon examination of the particular facts and involving the exercise of the sound discretion of those upon whom the duty of assessment lawfully devolves. Unless it can be that the fundamentals of State taxation differ radically from those of Federal taxation, it must be that this has already been determined by the final authority for—

> "The Fourteenth amendment * * * requires that * * * the citizen must be afforded an opportunity to be heard on all questions of liability and value, * * *." *Keeney v. New York, 222 U. S., 525, 535.*

The duty of assessment in such cases is not placed upon the courts, the processes of litigation are not those by which it is properly to be performed.

Thus, in the very recent case of *Loomis v. Waitles, 266 Fed. 876,* the Circuit Court of Appeals for the Eighth Circuit, affirming a judgment in favor of a taxpayer who sued a Collector of Internal Revenue to recover an amount collected as Federal income tax, said:

> "This court has no power or authority, in an action at law, at least, to assess property and levy a tax thereon; such power or authority in the present case having been vested by law in the Internal Revenue Department." *266 Fed. 876, 878.*

The manner in which the Commissioner of Internal Revenue sought to meet the difficulties consequent upon this uncertainty as to the value of legacies of life interests in trust funds substantiates the view herein advanced. In the case of Alexander S. Cochran, one of the residuary legatees here represented, the value assigned was *computed* in the manner set forth in Finding XIX *(R. 41)* which reads:

> "Computation of the amount of $9,400.82, still retained by defendants in respect of the interest of the said Alexander Smith Cochran in said estate, was made in pursuance and in accordance with the rules, tables and instructions set out in Finding XVII, and there was not at any time any specific investigation by the Commissioner of Internal Revenue as to said Alexander Smith Cochran's expectancy of life or as to the earning capacity of the

> trust fund provided for his benefit out of said estate, otherwise than by the application of said tables. The value of the interest of said Alexander Smith Cochran in the trust fund of $100,000,00 provided for his benefit was determined from said tables to be $70,018,96, to which was added $431,328,40 the sum paid to him prior to July 1, 1902, producing a total of $501,376,96, upon which the tax was calculated at the statutory rate of $1,87½ per hundred dollars."

"Values" were assigned, after March, 1915, to other interests in the estate represented by appellants by means of similar computations *(R. 41-3)*.

It is to be noted, however, that *there was not even any pretense of assessment until February, 1903 (R. 31, 40)*, and that the computation above described was not made before March, 1915 *(R. 31)*. The "rules, tables and instructions" referred to in the above finding are to be found in the Record *(pp. 33-39 and insert)*.

It is fully recognized, as required by the decision in *Simpson v. United States*, 252 U. S., 547, that it cannot now be objected that an *assessment* resulting from the application of these rules and tables is not lawful, as an assessment. The principle herein urged is that until such a lawful assessment has been made there is no such certainty as to the amount due as would be required to support an action of debt; no duty to pay anything and, therefore, no imposition of any tax.

Professor McGehee, after an admirable review of the decisions, states the rule as follows:

> "* * * when, instead of a specific, an

ad valorem tax is selected. Then, *before an individual liability for the tax can arise, it is essential that there be an assessment* of the property to be taxed, and an apportionment of the tax in accordance with the valuation determined by assessment and the rate of taxation." *L. P. McGehee, Due Process of Law Under the Federal Constitution, 1906, p. 236.*

B.

No lawful assessment under the legacy tax provisions of the Act of June 13, 1898, and amendments, could be made in February, 1903, or at any time after July 1, 1902, the date on which the tax was repealed.

Assuming the foregoing to have established that, under the facts of the instant case, no legacy tax, under the Act of June 13, 1898, and amendments, could be imposed until it was assessed, the Record shows that there was no effort to assess the estate here represented before February, 1903 *(R. 31, 40)*; that the "assessment" then made was subsequently abandoned and its illegality admitted by the refund of more than one-half of the amount then "assessed" *(R. 31)*, and that the amount now retained in the Treasury was "computed" after March, 1915 *(R. 31, 41-3)*, without, so far as the Record discloses, going through even the form of an assessment.

Without seeking advantage from this absence of formality it will suffice to inquire whether lawful assessment could be made after July 1, 1902, the

date of the repeal of the tax. That assessment could not be made after such repeal is strongly intimated, in a case in which the death was in June, 1899 (*Simpson v. United States, 252 U. S., 547, 548*), and the statutory period for the presentation of claims expired prior to November 1, 1900, that is "one year and eight months prior to July 1, 1902," the date on which the tax was repealed (*252 U. S., 547, 552*). In that case, Mr. Justice CLARKE, speaking for the Court, said, in part:

> "The case would be one for an increased assessment * * * if the War Revenue Act had not been repealed." *252 U. S., 547, 552.*

In that case the tax collected was assessed by the Commissioner of Internal Revenue—

> "* * * pursuant to the provisions of Section 29 of the Spanish War Revenue Act * * *" (*252 U. S., 547 549*),

while that Act was in full force, and was paid on April 15, 1901 (*252 U. S., 547, 550*), but the opinion indicates that a greater assessment, if made in time, would have been lawful.

Whether the right to assess continued after the repeal on July 1, 1902, would seem to involve an examination of Sections 7, 8 and 11 of the repealing Act of April 12, 1902 (*32 Stat., 96*) and, perhaps, of Section 13 of the Revised Statutes. Section 7 of the Act of April 12, 1902, repealed Section 29 of the Act of June 13, 1898, and all amendments thereto; Section 11, of the same Act, made the repeal effective on July 1, 1902, and Section 8 excluded from the repeal or "saved"—

> "all taxes or duties *imposed* by Section 29 of

the Act of June 13, 1898, and amendments thereof, *prior to the taking effect of this Act.*"

It has been considered, but apparently it has not been decided (*Hertz v. Woodman, 218 U. S., 205, 216-8*), that R. S. 13 might have some effect in perpetuating any *liability actually incurred* under Section 29 of the Act of June 13, 1898. This section reads:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." *R. S. 13.*

This statute is said to have been enacted in order to avoid the consequences of the common law rule that—

> "* * * *an unqualified repeal operates to destroy inchoate rights, as a release of imperfect obligations*, and as a remission of penalties and forfeitures *dependent upon the destroyed statute.*" *Hertz v. Woodman, 218 U. S., 205, 216, and cases there cited.*

The present significance, if any, of R. S. 13, is as follows:

> "That if, prior to the repealing act, the defendants in error* were under any liability or obligation to pay the tax or duty imposed

*The word "appellant" should, of course, be substituted for the purposes of the instant proceeding, for the term "defendants in error."

> by Section 29 of the Act of June 13, 1898, that obligation or liability was not relieved by the mere repeal of that section, nor as a consequence of the saving clause in the repealing Act, unless the special character of that clause, by plain implication, cuts down the scope and operation of the general rule in Section 13." *Hertz v. Woodman, 281 U. S., 205, 218.*

But "*liability*" for a tax is incurred by the "*imposition*" of the tax, it is not seen that it could be incurred in any other way.

> "Therefore we must take that general saving clause* into consideration as a part of the legislation involved in the determination whether a '*liability' had been incurred by the imposition of a tax* prior to the Act that destroyed the law under which it had been imposed." *Hertz* v. *Woodman, 281 U. S., 205, 218.*

It would appear that, as the saving clause of the repealing Act of April 12, 1902, *supra*, preserved the right to collect all taxes "*imposed*" under Section 29 prior to July 1, 1902, and R. S. 13, at the most, could only preserve the right to collect taxes *liability* for which had been *incurred* by their *imposition*, the latter adds nothing to the former.

> "The provisions of the repealing Act of April 12, 1902, were such that the tax was to be discontinued on July 1, of that year, but without affecting its collection where the right to it became fixed before that time." *United States v. Jones, 236 U. S., 106, 113.*

*The reference is to R. S. 13.

The whole question revolves, therefore, *upon the meaning and application of the word "imposed,"* the fifth word in the *special saving clause* of the repealing Act of April 12, 1902.

Was any tax *"imposed,"* prior to July 1, 1902, with respect to the interests represented by appellants? It was not "imposed" prior to that date unless it could be imposed before assessment. Nor, was it imposed before that date unless prior to July 1, 1902, liability or obligation to pay had already accrued. In *Mason v. Sargent, 104 U. S., 689,* this Court, reversing the trial court, directed judgment in favor of a taxpayer who had sued to recover the amount of a Federal inheritance tax collected under color of one of the Civil War revenue acts and declared, in effect, that liability or obligation to pay and the right of the Government to the tax accrue at the same instant of time.

> "No right to the payment of the tax had accrued at the date when the repealing act took effect; and, therefore, none to collect it can be deduced from its saving clauses." *104 U. S., 689, 693.*

It seems therefore that as there was no obligation to pay prior to July 1, 1902, the saving clause was ineffective as to these interests; the repeal of Section 29 was "an unqualified repeal," so far as appellants are concerned, and as to these interests, the common law rule *(Hertz v. Woodman, 218 U. S., 205, 216)* that such a repeal extinguishes imperfect obligations should be applied. If so, there could be no assessment after the dated of the repeal.

That no tax was *imposed* under such circumstances as those here presented was long ago

held, under the statutes now under consideration, in a decision from which appeal was not taken *(Farrell v. United States, 167 Fed., 639).* See also *People v. Weaver, 100 U. S., 539, 545* (quoted herein, supra, *5*); and the extract from Professor McGehee *(supra, 20)* on Due Process of Law; *37 Cyc. 987;* and *27 Amer. & Eng. Ency. of Law, 2 ed. 660-1.*

Only a few extracts from the mass of decisions supporting the view here taken will be presented; they follow.

> "The tax of a citizen is the result of the rate, applied to the value of the property which he owns, and he *is not taxed until the rate is thus applied*, by some legal mode of adjustment; *no duty of payment arises*, no proceeding to collect can be sustained, until *the tax is thus created.*" *Commonwealth v. Lehigh Valley Railroad, 104 Pa., 89, 101-2.*

> "The question whether the taxes laid under authority of the State can be collected in this suit depends upon the question whether they were lawfully assessed * * *. The assessments, being unlawful, created no lien upon the land. Those taxes, therefore, cannot be collected. * * *" *Van Brocklin v. Anderson, 117 U. S. 151, 180.*

> "*A valid assessment is*, of course, *indispensable* as a prerequisite to levying a valid tax." *Western Union v. Howe, 180 Fed. 44, 51.*

> "*Unless an assessment is made*, as provided by law, *no foundation is laid for the collection of the tax.*" *Custer County v. Anderson, 68 Fed. 341, 342.*

"During the period when, by law, property was to be valued for taxation purposes and a tax assessed, these steps were not taken * * *. The defendant, upon finding upon the annual record no valuation of his lot, was under no obligation to make any application to the taxing officers. * * *

"The only conclusion to be reached is that *there was a failure to impose any tax* for the year 1883, and, therefore, the proceedings for the sale of the land were void." *May v. Traphagen, 139 N. Y. 478, 481-2.*

"A legal assessment is the foundation of a legal tax * * *. No person is required or can be compelled to pay taxes which have not been assessed and levied in pursuance of law." *Northern Pacific R. R. Co. v. Carland, 5 Mont., 146, 171-4.*

See, also:

California v. Central Pacific, 127 U. S., 1;
Supervisors v. Stanley, 105 U. S., 305, 308;
Delaware, Lackawanna & Western v. Pa., 198 U. S., 341, 358;
Londoner v. Denver, 210 U. S., 373, 386;
Powder River Cattle Co. v. Commissioners, 45 Fed., 323, 328-9;
State v. South Penn. Oil Co. (West Va.) 24 S. E., 688, 697.

It is submitted that the law devolved upon the Commissioner of Internal Revenue the duty of *ascertaining* the tax, if any, due from appellants, prior to July 1, 1902, *by means of an assessment.* The Commissioner not having taken the

necessary steps before that date, the repeal of the law left no authority thereafter to assess or to collect and the collection of any amount whatever was unauthorized and illegal.

The second section of the Act of July 27, 1912, requires the Secretary of the Treasury to refund legacy taxes *illegally or erroneously assessed or collected* under color of the Act of June 13, 1898. If appellants are correct in these contentions, the whole sum exacted was erroneously and illegally collected and the amount now retained should be refunded. As the Treasury Department refused to make the refund it may be enforced in this proceeding *(United States* v. *Hvoslef, 237 U. S., 1)*.

Conclusion.

The judgment of the Court of Claims should be reversed.

All which is respectfully submitted.

H. T. NEWCOMB,
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FREDERICK L. FISHBACK,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1920.

ALEXADER SMITH COCHRAN AND WILLIAM F. COCHRAN, as surviving executors of the last will and testament of William F. Cochran, deceased, appellants,

v.

THE UNITED STATES.

No. 116.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This is a suit to recover $51,029.54, paid under the revenue act of June 13, 1898 (30 Stat., c. 448, p. 448), as taxes upon the legacies and distributive shares of an estate. It comes here by appeal from a judgment of the Court of Claims dismissing the petition.

LAWS INVOLVED.

By section 29 of the act of June 13, 1898, *supra*, administrators, executors, and other persons having in charge any legacies or distributive shares arising from personal property were required to

pay a tax thereon "where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory." The rate of tax imposed by the statute varied according to the degree of relationship between the intestate and the person to whom the legacy passed, but in every case it was a certain number of cents for each one hundred dollars of the clear value of such interest.

Under the authority of the act in question the Commissioner of Internal Revenue prescribed and promulgated general rules, tables, and instructions for use in determining the amount of taxes to be paid upon legacies or distributive shares. These regulations provided that the present value of annuities or life estates in funds should be determined according to certain recognized mortuary tables. (R. 33–37.)

The act of June 13, 1898, was a war measure. On April 12, 1902, parts of it, including section 29, were repealed; the repeal to take effect on July 1, 1902 (32 Stat., c. 500, p. 96). Section 8 of this act, however, provided "that all taxes or duties imposed by section 29 of the act of June 13, 1898, and amendments thereof, prior to the taking effect of this act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty of said act of June thirteenth, eighteen

hundred and ninety-eight, and amendments thereof, which are hereby continued in force, as follows." Then follows a full copy of section 30 of the act of 1898, which provides elaborately for the collection of the tax imposed by the act of 1898. On June 27, 1902, an act was passed (32 Stat., c. 1160, p. 406) which authorized a refund of so much of the taxes collected upon legacies as " may have been collected on contingent beneficial interests which shall not have become vested prior to July 1, 1902," and that no tax should thereafter be assessed or imposed upon or in respect of any contingent beneficial interests which shall not become absolutely vested in possession or enjoyment prior to July 1, 1902.

On July 27, 1912, an act was passed (37 Stat., c. 256, p. 240) extending the time for repayment of certain war revenue taxes erroneously collected. This act provided for the refunding of taxes erroneously or illegally assessed or collected under the provisions of section 29 of the act of 1898, or of any sums that may have been excessive or in any manner wrongfully collected, provided the claims therefor should be presented on or before the first day of January, 1914.

THE FACTS.

William F. Cochran, a citizen of the State of New York, died on December 27, 1901, and his will disposing of his estate was admitted to probate on January 9, 1902. (R., 28.) On July 1,

1902, when the repealing act went into effect, the value of the residuary estate had not been ascertained by the executors (R., 30), and the time within which creditors could file claims had not expired. (R., 28–29.) The executors, however, being satisfied that there would be a large residuary estate, had actually distributed to residuary legatees a considerable amount and transferred to trustees other amounts to establish trusts provided by the will for certain of the residuary legatees, the total amount thus paid prior to July 1, 1902, to legatees being in excess of two and a half million dollars.

There is no finding that the Internal Revenue Commissioner or his agents took any steps for the purpose of collecting the taxes on these legacies. The Court of Claims found, however, that in compliance with the requirements of section 30 of the act of June 13, 1898, the executors made a return on February 17, 1903, giving a schedule of legacies arising from the personal property of said estate and the amount of tax due thereon. This schedule was filed with the United States collector of internal revenue and was accepted by him as correct. The amount of tax shown to be due was the amount estimated by the executors themselves in accordance with the requirements of section 30 of the act of 1898 and the regulations of the Commissioner of Internal Revenue made thereunder. This amount was $158,321.78, and the Court of Claims finds that on March 14, 1903, it was paid

voluntarily to the United States collector of internal revenue. (R., 31.)

In making the above return the executors, evidently overlooking the act of June 27, 1902, limiting the tax to such legacies as shall have become vested prior to July 1, 1902, included in their return portions of legacies which were not paid until after that date. Later they concluded that not only the amounts paid after July 1, 1902, but those amounts as well which had been paid prior to that date, had not become vested prior thereto because, the estate not having been fully settled, a possibility remained that the legatees might be called on to pay debts. They therefore filed a claim for the refunding of the entire $158,321.78, which they had previously paid. (R. 31.) This claim was sustained so far as it related to the taxes on legacies not paid until after July 1, 1902, but was rejected as to the taxes on legacies paid prior to that date. The result was that there was paid back the sum of $107,292.24, and the Government retained, of the amount previously paid, $51,029.54, and it was this latter amount that this suit was brought to recover.

CONTENTION OF APPELLANT WHEN SUIT WAS COMMENCED AND NOW.

Appellants filed their suit on the theory that the time for filing claims against the estate not having expired on July 1, 1902, and the legatees not being entitled therefore to demand as a matter of right

the payment of legacies, no part of the legacies, whether paid before or after July 1, 1902, had, on that day, become vested so as to be subject to tax. This contention, it is conceded, is no longer tenable, since the contrary was directly decided in *Simpson* v. *United States*, 252 U. S. 548. It is now admitted, therefore, that the tax on the legacies paid prior to July 1, 1902, which include all that is now sought to be recovered, could properly and lawfully have been assessed at the time they were distributed, and the contention is limited to one that it was unlawfully collected, because no assessment was made before July 1, 1902, when the act of 1898 was repealed.

Counsel, in fact, say that only one question is now presented for determination, which they state as follows:

> Could any sum be lawfully collected as a legacy tax, under the Spanish War revenue act of June 13, 1898, and amendments, unless there was an assessment before July 1, 1902, the date on which the law establishing the tax was repealed? (Brief, p. 2.)

Their argument is directed to two propositions: First, that under the act of June 13, 1898, there was no sum, either certain or readily reduced to a certainty, which was due by force of the act of Congress, and that therefore there was no liability unless and until an assessment was made; and, second, that there was no authority to make an assessment after July 1, 1902.

BRIEF.

I.

WHETHER ANY ASSESSMENT WAS NECESSARY FOR THE PURPOSE OF COLLECTING THIS TAX IS NOW WHOLLY IMMATERIAL.

The brief in behalf of appellant is devoted mainly to the proposition that the tax under the act of 1898 could not be collected without an assessment previously made. It is conceded that where a statute levies a tax and itself fixes the amount due, or imposes the tax in such a way as that the amount is readily reduced to a certainty, no assessment has to be made. The contention is that in this case, in order to ascertain the amount due, there had to be an assessment or valuation made by the proper officers. It has been seen, however, that in the case of a legacy paid in money the statute is just as definite and certain as any assessment could be made, because it requires a tax of a certain number of cents for each one hundred dollars of the legacy.

The greater part of the taxes now involved were paid upon legacies of this kind. The only exception is that some of the legacies did not pass to the legatees absolutely but went to establish a trust fund, the income of which was to be paid to the legatees during their lifetime. It is said that it was necessary to make an assessment in order to fix the present value of such legacies. But it has been shown above that, upon the passage of the act

1902, when the repealing act went into effect, the value of the residuary estate had not been ascertained by the executors (R., 30), and the time within which creditors could file claims had not expired. (R., 28–29.) The executors, however, being satisfied that there would be a large residuary estate, had actually distributed to residuary legatees a considerable amount and transferred to trustees other amounts to establish trusts provided by the will for certain of the residuary legatees, the total amount thus paid prior to July 1, 1902, to legatees being in excess of two and a half million dollars.

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The greater part of the taxes now involved were paid upon legacies of this kind. The only exception is that some of the legacies did not pass to the legatees absolutely but went to establish a trust fund, the income of which was to be paid to the legatees during their lifetime. It is said that it was necessary to make an assessment in order to fix the present value of such legacies. But it has been shown above that, upon the passage of the act

of 1898, the proper officer promulgated regulations under which the present value of such legacies was to be determined simply by the application of certain recognized mortuary tables. This made the amount due as certain or readily reduced to a certainty as is the amount due on a legacy paid in cash. And this court has held that these regulations were authorized, and that an assessment made in accordance with them is not subject to attack. *Simpson* v. *United States,* 252 U. S. 547, 550. A practical illustration of this certainty is that the executors in this case themselves figured the tax under the law and the regulations, and made their return without assistance from any officer of the Government.

It is, however, now wholly immaterial whether an assessment was required by law or whether one was made. If it be assumed that the Government could not sue for or compel the collection of this tax without first making an assessment, the assessment would avail appellants nothing in this case. The Government is not seeking to recover a tax. The appellants have voluntarily paid the taxes. By the grace of Congress, they are now permitted to come into court and recover so much of what they paid as they did not owe the Government. The tax having been paid voluntarily, the court can not be concerned with whether all the technicalities and formalities which might have been necessary to enable the Government to collect the

tax in the first instance, if its payment had been resisted, have been complied with.

The sole question is whether the appellants paid more than they ought to have paid. It is conceded that they ought to have paid the tax on those legacies which were distributed prior to July 1, 1902. The present contention makes the right of the Government to retain taxes thus legally and rightfully owing depend upon the fact that officials had or had not made a formal assessment before July 1, 1902. If the distribution had been made prior to that time and the fact kept secret, or if the distribution had been made on the last day of June, 1902, leaving no opportunity to make the assessment, the Government must now refund the taxes although they were voluntarily paid and are conceded to have been correct in amount. It is submitted that the act of Congress under which this suit is maintained was intended as a means for securing the refund of taxes which ought not to have been collected, and not for the correction of mere irregularities as a result of which the Government received only what it was entitled to. And yet this whole case depends alone upon the insistence that taxes collected upon a report of executors made out in accord with the law and the regulations of the Internal Revenue Department, and fixing the amount of tax precisely as it would have been fixed by a formal assessment, must be refunded because, forsooth, exactly the

same amount had not previously been fixed by a formal assessment. The question of an assessment is wholly immaterial in this case.

II.

IF AN ASSESSMENT WAS NECESSARY, THE RIGHT TO MAKE IT AFTER JULY 1, 1902, WAS EXPRESSLY RESERVED BY THE REPEALING ACT, AND THE ACCEPTANCE AS CORRECT OF THE REPORT MADE BY THE EXECUTORS IN 1903 WAS TO ALL INTENTS AND PURPOSES AN ASSESSMENT.

It is difficult to see how it can be contended that the repealing act cut off the right to make assessments, if necessary, after July 1, 1902, on legacies paid prior to that date. The repealing act not only in general terms continued in force all the provisions of section 30 of the act of 1898, but expressly reenacted section 30. This section, as carried into the repealing act, provides that the tax shall be payable one year after the death of the testator and shall be a lien and charge upon the estate for twenty years and requires executors and administrators to give notice in writing to the collector or deputy collector of his district of all legacies or distributive shares paid out by him. Congress could not have in plainer terms declared the right of the Government to collect, without regard to the repeal of the original act, all taxes to which legacies paid out before the repeal were subject and to take every step, including an assessment, if that is necessary, to effect the collection. All the relief

from the provisions of the original act that Congress evinced a purpose to give was its enactment in 1902, by which the tax was limited to a tax upon legacies which became vested before the effective date of the repealing act.

In the case of *United States* v. *Jones,* 236 U. S. 106, 113, speaking of this repealing act, it was said:

> The provisions of the repealing act of April 12, 1902, were such that the tax was to be discontinued on July 1 of that year, but without affecting its collection where the right to it became fixed before that time.

In order to support appellant's argument, the saving clause of the repealing act is read as saving the right only to collect all taxes imposed *under* section 29 prior to July 1, 1902, the insistence being that no tax is imposed until some official has taken action under section 29 by making an assessment; but this is not the language of the saving clause. It relates to " all taxes or duties imposed *by* section 29 " prior to July 1, 1902. In other words, it treats the act of 1898 as itself imposing the tax. That act did impose a tax upon all legacies distributed before July 1, 1902. Even if an assessment was necessary, the liability to pay attached when the legacies were distributed. The obligation was incurred, then, whether it was for a definite and fixed amount or an amount to be thereafter fixed. If the latter, the repealing act

by reenacting section 30 of the original act expressly provided the means by which the amount was thereafter to be fixed.

III.

It is respectfully submitted that the judgment of the Court or Claims is in all respects correct and should be affirmed.

WILLIAM L. FRIERSON,
Solicitor General.

NOVEMBER, 1920.

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Counsel for Appellants.

COCHRAN ET AL., AS SURVIVING EXECUTORS OF COCHRAN, v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 116. Argued December 15, 16, 1920.—Decided January 3, 1921.

Section 29 of the War Revenue Act of June 13, 1898, which taxed legacies and distributive shares at so much per hundred dollars of clear value, was repealed by the Act of April 12, 1902, with a proviso saving all taxes imposed by § 29 prior to July 1, 1902, when the repeal became effective. In an action against the United States to recover taxes computed, returned and voluntarily paid by executors after July 1, 1902, on legacies paid over before that date, *held*:

1. That a formal assessment prior to July 1, 1902, was not necessary to bring the taxes within the saving clause as taxes "imposed" prior to that date. P. 390.
2. That such assessment was not necessary to ascertain the value of life interests in trust funds, their value being ascertainable by computation upon mortality tables and rules lawfully adopted by the Commissioner of Internal Revenue. *Id.* See *Simpson* v. *United States*, 252 U. S. 547.
3. That the fact that the estate was not completely settled and that the legatees and trustee might be liable to refund if retained assets proved insufficient to pay all claims, was no ground for recovery of the taxes, in view of the facts that the personal estate greatly exceeded in value the amount of the legacies, and the total of claims and expenses during many years after the commencement of administration was comparatively insignificant. P. 392.
4. One who seeks to recover money voluntarily paid as a tax upon the ground that the tax was illegal, must prove its illegality and may not rely on mere assertion and speculation. P. 393.

54 Ct. Clms. 219, affirmed.

THE case is stated in the opinion.

Mr. H. T. Newcomb, with whom *Mr. Frederick L. Fishback* was on the brief, for appellants.

The Solicitor General for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal from a judgment of the Court of Claims denying recovery of taxes paid under the War Revenue Act of June 13, 1898, and amendments, upon certain legacies made under the will of William F. Cochran.

The facts so far as we deem them material are as follows: Cochran died in New York, December 27, 1901, leaving a will and a personal estate of the value of $7,918,027.18, of which appellants and Eva S. Cochran were made executors. The latter has since died. The will was probated January 9, 1902, and letters testamentary issued the same date and administration was immediately undertaken and proceeded with without extraordinary or unnecessary delay.

Six months' notice to creditors was given as required by the law of New York and the time for the presentation of claims expired August 4, 1902. Prior to September 30, 1902, debts and claims against the estate were presented and for the most part paid to the aggregate amount of $98,589.04 of which amount $66,776.25 were paid prior to July 1, 1902. Expenses of administration during that period had been ascertained to be $125,000, of which sum $13,047.16 were paid prior to July 1, 1902. Otherwise, claims and expenses of administration had not been ascertained.

Certain sums were bequeathed to the executors in trust for the children of Cochran and there was also a legacy to a niece and one to a stranger to his blood. Trusts were set up in accordance with the will and the legatees were paid prior to July 1, 1902, the sums provided to be paid. The aggregate payment so made amounted to the sum of $3,140,979.10.

In 1892 and 1893 litigation was instituted against the decedent which might involve the estate, it was estimated, in the payment of several hundred thousand dollars or more. The litigation according to the findings of the Court of Claims is still in progress and on account of it money has been retained by the executors that might otherwise have been distributed. The probable outcome of the litigation is not shown.

Under the laws of New York funds in the hands of executors after the expiration of notice to creditors are liable to after-discovered debts, and legatees who have received money prior to the expiration of such notice are liable up to the amount paid them for claims subsequently presented. The executors were not secured for the payments to legatees prior to July 1, 1902, and prior to that date the value of the residuary estate had not been ascertained.

In compliance with § 30 of the Act of June 13, 1898, the executors on February 17, 1903, made a return and filed it with the Collector of Internal Revenue giving a schedule of the legacies arising from the personal property of the estate and the amount of tax due thereon. The Collector accepted the schedule as correct. The amount paid to him by the executors was the amount they estimated as the amount of the taxes due. The schedule showed the taxes on each legacy and that the total was $158,321.78, which sum was by the Collector paid to the United States.

July 16, 1904, a demand was made upon the Commissioner of Internal Revenue for the repayment to the executors of the sum paid. After one rejection (October 22, 1910), the Commissioner (March 15, 1915), recommended the claim for allowance in the sum of $107,292.24, and for the rejection of $51,029.54. The recommendation was approved by the Secretary of the Treasury. The former sum was paid, the latter was not, and remains unrefunded.

This sum was computed in respect to the interest of eight different legatees of which six were residuary legatees, and the computations were made according to certain general rules, tables and instructions for the use of Internal Revenue officers, administrators and trustees in determining the amount of taxes to be paid to the United States upon legacies or distributive shares arising from personal property under the Act of June 13, 1898. There was no special investigation by the Commissioner of Internal Revenue as to the expectancy of life of the several beneficiaries or as to the earning power of the bonds placed in trust for them respectively, and for their benefit.

The contentions of the parties are quite accurately opposed. The appellants contend that an assessment was a necessary condition to the collection of the taxes and that there was no assessment until after July 1, 1902, and that on that date the law which established the taxes was repealed.

In opposition it is urged by the United States that if an assessment was necessary the right to make it was reserved by the Repealing Act, and that the appellants, as executors, having made a report of the legacies and the taxes thereon, the report and its acceptance by the Collector of Internal Revenue was to all intents and purposes an assessment. It is further urged that if an assessment was necessary for the purpose of collecting the taxes, it is now immaterial.

These contentions constitute the issue in the case and depend upon the relation of the law (mostly statutory) to the facts and what is determinate. As an element in the determination, the use of the rules of the Department and the mortality tables counsel dismisses from controversy, in connection to *Henry* v. *United States*, 251 U. S. 393, and *Simpson* v. *United States*, 252 U. S. 547. The remaining element, that is, the necessity of an assessment prior to July 1, 1902, to the validity of the taxes in ques-

tion, counsel for appellants say, revolves "upon the meaning and application of the word 'imposed,' the fifth word in the special saving clause of the repealing Act of April 12, 1902." And counsel define the word to include all of the steps necessary to the collection of a tax, making it tantamount to "accrued." In other words, the contention is, that a tax is not "imposed" by the simple declaration of a law that property shall be subject to it, but "imposed" only when the tax becomes due and payable, and that the taxes in the present case had not reached that essential condition before July 1, 1902, because they had not been assessed. In support of the contention, counsel cites *Mason* v. *Sargent*, 104 U. S. 689, and *Hertz* v. *Woodman*, 218 U. S. 205. There is much in the latter case which, it may be urged, is adverse to the contention, but upon this we are not called upon to pass, for counsel concede that if a statute imposes a tax in such way as that the amount is readily reduced to a certainty, no assessment is necessary. And this is true of the taxes in question.

By § 29 of the Act of June 13, 1898, c. 448, 30 Stat. 448, legacies or distributive shares such as this case is concerned with [1] are made subject to a duty at the rate of seventy-five cents for each and every hundred dollars of the clear value thereof and the tax is made a lien and charge for twenty years and its payment required before payment and distribution to the legatees. The section also requires the trustee to make and render to the Collector a schedule, list or statement of the legacies together with the amount of duty that has accrued or shall accrue thereon. Section 29 was amended March 2, 1901, but no change in anything important to the present controversy. Section 29 and the amendments of March 2, 1901, were repealed by Act of April 12, 1902, c. 500, 32 Stat. 97, *et*

[1] We disregard a distinction in the legacies as not important to the argument.

seq., but it was provided that "all taxes or duties imposed by section twenty-nine . . . and amendments thereof, prior to the taking effect" of the repealing act, should "be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty . . . and amendments thereof, which are hereby continued in force." Except as so continued in force the repealing statute took effect July 1, 1902.

The schedule under § 29 was rendered, as we have seen, accepted by the Collector, and taxes were paid in accordance therewith, in the sum of $158,321.78.

The schedule included legacies that had been paid after July 1, 1902, but as by Act of June 27, 1902, c. 1160, 32 Stat. 406, such legacies were not subject to a tax, the taxes on them were refunded, upon demand of the executors, but the Government refused to refund the taxes on legacies paid prior to that date. This suit was brought for their amount, that is, the sum of $51,029.54.

To support recovery, it is contended that there was no obligation of payment because, as has already been said, the amount to be paid was not made certain by assessment, or, to quote counsel, was not "so certain (or capable of such ascertainment) that reasonable minds could not disagree and that the exercise of judgment and the consideration and weighing of evidence could not affect the result." For this *Hagar* v. *Reclamation District*, 111 U. S. 701, and other cases are cited and reviewed.

But we cannot agree that there was uncertainty. We have seen the amount of taxes imposed by the statute was definite and the appellants had no trouble in estimating and returning the value of the legacies upon which it was imposed. The basis of the claim of uncertainty is that the estate was and is not settled and that there is a possibility that the legatees may be called upon to pay debts. The contention is as strained and baseless as that rejected in *Simpson* v. *United States*, *supra*.

It is to be remembered besides, that the case does not present a case of resistance to the payment of a tax, but of the recovery of taxes voluntarily paid and that, therefore, the illegality of them should be shown not only by averment but by proof, not, as it is attempted to be, by assertion and speculation. It is true that it is averred that prior to July 1, 1902, the amount of claims against the estate had not been ascertained and that there was responsibility upon the trustees and legatees to make a return of the whole or ratable portions of the legacies to the extent that the sums remaining in the estate should be insufficient to satisfy all valid claims. It is conceded, however, the contingency of this might have terminated August 1, 1902, and while it is averred that the clear value of the interests of the legatees was at all times prior to July 1, 1902, uncertain and indefinite, and still is so, there stand in opposition the facts of the case and the refutation that an estate of the net personal value of nearly eight million dollars was or is in danger of embarrassment by the payment of legacies of less than one million dollars. And we have seen that the executors who had knowledge of the condition of the estate, and all that it might be made subject to, did not hesitate to make a return of the legacies to the Collector of Internal Revenue and pay the taxes thereon. The petition in this case was filed in the Court of Claims June 23, 1916, fourteen years after the commencement of the administration of the estate and nearly as long after the time of presentation of claims against it, and the record shows that the total of the claims and expenses of administration, including funeral expenses, amounts to the sum of $235,700. In the face of this exhibition we are asked to speculate upon possibility of the existence of liabilities that fourteen years have not developed.

Judgment affirmed.